(1) 0617 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

DAVID EICHENLAUB, *et al.*,

Petitioners,

v.

TOWNSHIP OF INDIANA, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

GERRI L. SPERLING
METZ LEWIS L.L.C.
11 Stanwix Street
18th Floor
Pittsburgh, PA 15222
(412) 918-1165

CATHERINE E. STETSON
CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), this Court held that a police officer engaged in a high-speed pursuit does not violate the Fourteenth Amendment's guarantee of substantive due process unless his actions "shock the conscience." The courts of appeals are deeply divided over the following question:

Whether—as the Third Circuit below held, in accord with the Tenth, Eleventh, and D.C. Circuits—all substantive-due-process claims involving executive action are subject to the "shocks the conscience" standard, or whether—as the First, Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have held—only certain types of executive action are subject to that standard.

PARTIES TO THE PROCEEDINGS

Petitioners are David Eichenlaub, Daniel Eichenlaub, and Barbara Eichenlaub. They were plaintiffs in the District Court, appellants in the first appeal before the United States Court of Appeals for the Third Circuit, and appellees/cross-appellants in the second appeal before the Third Circuit.

Respondents are Township of Indiana; Township of Indiana Board of Supervisors; Dorothy T. Claus; George E. Dull, Jr.; Charles R. Federoff; Jeffrey D. Peck; Daniel L. Taylor, in their official capacities; Township of Indiana Code Enforcement Officer Jeffrey S. Curti, in his official capacity; Dan Anderson, in his official capacity; Mildred Brozek, Administratrix of the Estate of Kevin Brozek; and Township of Indiana Engineer Daniel B. Slagle, in his individual and official capacity. They were defendants in the District Court, appellees in the first appeal before the United States Court of Appeals for the Third Circuit, and appellants/cross-appellees in the second appeal before the Third Circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 13

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO ALL SUBSTANTIVE-DUE-PROCESS CLAIMS INVOLVING EXECUTIVE ACTION 13

II. THE THIRD CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S PRECEDENTS 21

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING 27

CONCLUSION 28

TABLE OF CONTENTS—Continued

Page

APPENDICES

APPENDIX A:

Opinion of the Court of Appeals, dated September 21, 2004 ..... 1a

APPENDIX B:

Opinion of the Court of Appeals, dated January 25, 2007 ..... 22a

APPENDIX C:

Memorandum Order of the District Court, dated May 29, 2003 ..... 35a

APPENDIX D:

Report and Recommendation of the Magistrate Judge, dated August 27, 2002 ..... 48a

APPENDIX E:

Order Denying Rehearing, dated February 23, 2007 ..... 99a

APPENDIX F:

Letter from Justice Souter Extending Petitioners' Time to File, dated May 15, 2007 ..... 102a

TABLE OF AUTHORITIES

Page

Cases:

Bello v. *Walker*, 840 F.2d 1124, *cert. denied*, 488 U.S. 851 (1988) 6, 7, 10

Blumenthal Inv. Trusts v. *City of West Des Moines*, 636 N.W.2d 255 (Iowa 2001) 21

Braxton v. *United States*, 500 U.S. 344 (1991) 13

Breithaupt v. *Abram*, 352 U.S. 432 (1957) 23

Brody v. *City of Mason*, 250 F.3d 432 (6th Cir. 2001) 18

Camuglia v. *City of Albuquerque*, 448 F.3d 1214 (10th Cir. 2006) 19

Chavez v. *Martinez*, 538 U.S. 760 (2003) 25

Christensen v. *County of Boone*, 483 F.3d 454 (7th Cir. 2007) 24

Clubside, Inc. v. *Valentin*, 468 F.3d 144 (2d Cir. 2006) 17

Collins v. *City of Harker Heights*, 503 U.S. 115 (1992) 23

County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) ..... *passim*

Daniels v. *Williams*, 474 U.S. 327 (1986) 22

Davidson v. *Cannon*, 474 U.S. 344 (1986) 6

Davis v. *Rennie*, 264 F.3d 86 (1st Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002) 14, 15, 19

TABLE OF AUTHORITIES—Continued

Page

Cases:

Flaskamp v. *Dearborn Pub. Schs.*, 385 F.3d 935 (6th Cir. 2004) 19

Fraternal Order of Police Dep't of Corrs. Labor Comm. v. *Williams*, 375 F.3d 1141 (D.C. Cir. 2004) 19

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 13

Harlen Assocs. v. *Incorporated Village of Mineola*, 273 F.3d 494 (2d Cir. 2001) 17

Hurtado v. *California*, 110 U.S. 516 (1884) 22

Iowa Coal Min. Co. v. *Monroe County*, 257 F.3d 846 (8th Cir. 2001) 19

Kennedy v. *City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) 14, 15, 16

Kennedy v. *City of Ridgefield*, 440 F.3d 1091 (9th Cir. 2006) (en banc) 16

Khan v. *Gallitano*, 180 F.3d 829 (7th Cir. 1999) 14, 15, 24

Koscielski v. *City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006) 19

L.W. v. *Grubbs*, 92 F.3d 894 (9th Cir. 1996) 16

Laughter v. *Board of County Com'rs for Sweetwater County*, 110 P.3d 875 (Wyo. 2005) 20

TABLE OF AUTHORITIES—Continued

Page

Cases:

Mariana v. *Fisher*, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004) 12

Mercer v. *Theriot*, 377 U.S. 152 (1964) 13

Midnight Session, Ltd. v. *City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992) 6

Mikeska v. *City of Galveston*, 451 F.3d 376 (5th Cir. 2006) 18

Nix v. *Franklin County Sch. Dist.*, 311 F.3d 1373 (11th Cir. 2002), *cert. denied*, 538 U.S. 946 (2003) 19

O'Connor v. *Pierson*, 426 F.3d 187 (2d Cir. 2005) 17

O'Mara v. *Town of Wappinger*, 485 F.3d 693 (2d Cir. 2007) 17

Parkway Garage, Inc. v. *City of Philadelphia*, 5 F.3d 685 (3d Cir. 1993) 6

Pearson v. *City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) 18, 20

PFZ Props., Inc. v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 563 U.S. 257 (1992) 20

Rochin v. *California*, 342 U.S. 165 (1952) 21, 22, 23

Salamacha v. *Lynch*, 165 F.3d 14 (2d Cir. 1998) 24

TABLE OF AUTHORITIES—Continued

Page

Cases:

Schad v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) 22

SFW Arecibo, Ltd. v. *Rodríguez*, 415 F.3d 135 (1st Cir.), *cert. denied*, 126 S. Ct. 829 (2005) 18, 19

Shalala v. *Illinois Council On Long Term Care, Inc.*, 529 U.S. 1 (2000) 21

Simi Inv. Co. v. *Harris County*, 236 F.3d 240 (5th Cir. 2000), *cert. denied*, 534 U.S. 1022 (2001) 18

Smith ex rel. Smith v. *Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168 (2d Cir. 2002) 17

Sunrise Corp. of Myrtle Beach v. *City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1618 (2006) 18

Sylvia Dev. Corp. v. *Calvert County*, 48 F.3d 810 (4th Cir. 1995) 18

Tinker v. *Beasley*, 429 F.3d 1324 (11th Cir. 2005) 19

Tri County Landfill Ass'n v. *Brule County*, 619 N.W.2d 663 (S.D. 2000) 20

Tri County Paving, Inc. v. *Ashe County*, 281 F.3d 430 (4th Cir. 2002) 18

Tun v. *Whitticker*, 398 F.3d 899 (7th Cir. 2005) 24

TABLE OF AUTHORITIES—Continued

Page

Cases:

United Artists Theatre Circuit, Inc. v. *Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) ..... *passim*

United Artists Theatre Circuit, Inc. v. *Township of Warrington*, 324 F.3d 133 (3d Cir. 2003) (en banc) 10, 25, 26

United States v. *Rahman*, 189 F.3d 88 (2d Cir.), *cert. denied*, 528 U.S. 982 (1999) 17

United States v. *Salerno*, 481 U.S. 739 (1987) 23

Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 22

Village of Euclid v. *Amber Realty*, 272 U.S. 365 (1926) 22

Washington v. *Glucksberg*, 521 U.S. 702 (1997) 14, 15, 19

Whitley v. *Albers*, 475 U.S. 312 (1986) 9, 23

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 8

Worsley Cos. v. *Town of Mount Pleasant*, 528 S.E.2d 657 (S.C. 2000) 21

Youngberg v. *Romeo*, 457 U.S. 307 (1982) 15

Constitution:

U.S. Const. amend. I 6, 11

U.S. Const. amend. XIV, cl. 3 ..... 2, 6, 22

TABLE OF AUTHORITIES—Continued

Page

Statutes:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 3

Rules:

S. Ct. R. 10(a) 13

S. Ct. R. 10(c) 21

Other Authorities:

Compact Oxford English Dictionary of Current English (2005) 22

Parna A. Mehrbani, *Substantive Due Process Claims in the Land-Use Context: The Need For a Simple and Intelligent Standard of Review*, 35 Envtl. L. 209 (2005) 20, 25

Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002) 13

Matthew D. Umhofer, *Confusing Pursuits:* Sacramento v. Lewis *and the Future of Substantive Due Process in the Executive Setting*, 41 Santa Clara L. Rev. 437 (2001) 20

IN THE

Supreme Court of the United States

No. 06-

DAVID EICHENLAUB, *et al.*,

Petitioners,

v.

TOWNSHIP OF INDIANA, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

David, Daniel, and Barbara Eichenlaub ("the Eichenlaubs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The initial opinion of the Third Circuit affirming the District Court's entry of summary judgment in part and reversing in part is reported at 385 F.3d 274 and reprinted in the appendix hereto ("App.") at 1a. The second opinion of the Third Circuit affirming the District Court's trial and post-trial rulings is not reported and is reprinted at App. 22a. The opinion of the District Court rejecting the Magistrate Judge's report and entering judgment against the Eichenlaubs on their

substantive-due-process claim is not reported and is reprinted at App. 35a. The Magistrate Judge's Report and Recommendation is not reported and is reprinted at App. 48a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 2007. App. 22a. A timely petition for rehearing and rehearing *en banc* was denied on February 23, 2007. App. 101a. On May 15, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including June 25, 2007. App. 102a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case concerns an important question of constitutional law: whether the "shocks the conscience" test applies to all substantive-due-process claims involving executive action, or only to a certain subset. In *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), this Court "granted certiorari to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839 (citation omitted). The Court held that the correct test for these sorts of cases is whether the police action "shocks the conscience." *Id.* at 847. Since *Lewis*, the federal courts of appeals have divided seven-to-four over whether "shocks the conscience" likewise provides the substantive-due-process "standard of culpability" for *all* executive officers in *all* contexts.

This case squarely presents that question. The Eichenlaubs, petitioners here, were embroiled in a land-use

dispute with government officials in Indiana Township, Pennsylvania. As the dispute dragged on, these officials subjected the Eichenlaubs to egregious treatment, including baseless civil citations and a colossal retroactive "mid-year" property-tax assessment that changed the existing $6,800 bill into one for more than $68,000. Armed with evidence that this treatment was retaliatory, the Eichenlaubs filed suit under 42 U.S.C. § 1983, alleging that the Township's actions were driven by an "improper motive" and therefore violated the Fourteenth Amendment's substantive-due-process guarantee.

While the case was pending, the Third Circuit in a separate case jettisoned its longstanding "improper motive" test, concluding that this Court's decision in *Lewis* established "shocks the conscience" as the uniform standard to evaluate *all* executive action in substantive-due-process cases. *See United Artists Theatre Circuit, Inc.* v. *Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). A year later, the Eichenlaubs' case reached the Third Circuit, and the panel reaffirmed the new rule it had fashioned in *United Artists*. Applying the "shocks the conscience" test, the Court of Appeals held that the Eichenlaubs failed to state a substantive-due-process claim.

The Third Circuit's across-the-board "shocks the conscience" rule squarely conflicts with the rulings of at least seven other circuits. Three circuits—the First, Seventh, and Ninth—have explicitly considered, and rejected, the rule that *Lewis*'s "shocks the conscience" standard applies to all executive-action cases. And at least four more—the Second, Fourth, Fifth, and Sixth—have repeatedly declined to use the "shocks the conscience" test in certain executive-action contexts (often land-use cases). Meanwhile, the Tenth, Eleventh, and District of Columbia Circuits have embraced the categorical approach the Third Circuit has taken. This Court should grant certiorari to resolve the multiple conflicts on this important and recurring question.

STATEMENT OF THE CASE

1. Petitioners are a married couple, Daniel and Barbara Eichenlaub, and Daniel's brother, David Eichenlaub. The Eichenlaubs own two parcels of property in Indiana Township, Pennsylvania ("the Township"). Beginning in the mid-1990s, the Eichenlaubs sought the Township's permission to develop one parcel for residential use and to grade portions of the other parcel for use as a container nursery for their landscaping business.

But the Township refused, leveling a number of meritless and arbitrary objections to the Eichenlaubs' proposals. For example, respondent Jeffrey Curti informed the Eichenlaubs that they could not build homes on the first parcel unless they obtained both a grading permit and approval for a revised subdivision plan under the Township's current subdivision ordinance. The law was clear that the Eichenlaubs did not need any such approval—their land was governed by an earlier-approved subdivision plan. Nonetheless, the Eichenlaubs relented. Under protest, they applied for and received a grading permit, hired an engineering firm, and then submitted a revised subdivision plan.

The Township still refused to approve the Eichenlaubs' plans. The respondent Board of Supervisors ("Board") voted to deny the revised subdivision plan that the Eichenlaubs were forced to needlessly prepare in the first place. App. 54a. The Board's action triggered a two-month process that followed the same predictable cycle: The Eichenlaubs repeatedly revised their plan to conform to the Board's wishes and the Board repeatedly denied the plan anyway. *Id.* 54a-55a. Throughout this period, the Eichenlaubs wrote letters to the Board and appeared at Board meetings to protest the Board's actions. Finally, on June 22, 1999, the Board voted to conditionally approve the yet-again-revised plan. *Id.* 55a. But when they received a draft developer's agreement from the Township, the Eichenlaubs realized that it subjected

them to numerous conditions and obligations not applied to other Township property owners. The Eichenlaubs therefore withdrew their plan application. *Id.*

2. It was at this point that the Eichenlaubs' problems began in earnest. Displeased with the Eichenlaubs for having criticized and publicized the Township's arbitrary actions, the Township launched a series of attacks against them. The most egregious example involved the Eichenlaubs' taxes. In early 2001, property owned by the Eichenlaubs and their father had received a collective assessment of $6,800. J.A. 1083-1086. The Eichenlaubs promptly paid these taxes. But in October of the same year, the Eichenlaubs received notice of a *retroactive* assessment change, upping the tax bill on the same property for the same year *tenfold*, to $68,000. *Id.*; *see also* App. 69a. Through discovery, the Eichenlaubs learned that the Township employee responsible for this stunning turnabout was the girlfriend of Kevin Brozek, the Township manager who long had been embroiled in the Eichenlaubs' land-use dispute. App. 68a. Based on this information and other details gleaned from discovery, the Eichenlaubs alleged before the District Court that Brozek's girlfriend had "transmitted false information" to the County so that the Eichenlaubs' tax bill would be increased. *Id.* 69a.

This was far from the only retaliation the Eichenlaubs alleged in their Complaint and subsequent filings. At the outset, respondents applied onerous subdivision requirements to the Eichenlaubs' land, even while acknowledging that the same requirements were not being applied to other landowners. *See* J.A. 572-574 (deposition of Jeffrey Curti). Respondents also conducted unannounced inspections of the Eichenlaubs' property and issued them baseless citations for having allegedly violated the Township's Grading Ordinance. To compound matters, respondent Curti reported the supposed violations to county officials, leading the county to issue unfounded compliance notices. App. 56a. The Eichenlaubs were fully cleared of the cited violations. *Id.* But

the respondents were not yet done with the Eichenlaubs. In March 2001, the Board obstructed the Eichenlaubs' ability to develop their land by refusing to sign off on documents allowing utility companies to serve their property. *Id.* 67a-68a. To the surprise of at least one Board member, this decision was made behind closed doors and never subjected to a public vote. *Id.* 68a. These abuses of authority were further livened by comments ranging from revealing to vicious: One Township official, for example, derided David Eichenlaub as a "troublemaker," J.A. 864-865, and referred to the Eichenlaubs' attorney in graphically vulgar terms, stating, among other things, that he wanted to "sever" the attorney's head. J.A. 1075-1077; *see also* App. 67a n.4.

3. The Eichenlaubs filed suit in September 1999. App. 51a. They alleged, among other things, that Township officials violated their First Amendment rights to petition and to be free of retaliation and their Fourteenth Amendment rights to equal protection and substantive due process. *Id.* 4a-5a. Their substantive-due-process claim was based on then-controlling Third Circuit law, which required a showing that the government's actions were (1) not rationally related to a legitimate government interest, or (2) " 'motivated by bias, bad faith, or improper motive.' " *Parkway Garage, Inc.* v. *City of Philadelphia*, 5 F.3d 685, 693 (3d Cir. 1993) (quoting *Midnight Session, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992)). This settled rule stemmed from *Bello* v. *Walker*, 840 F.2d 1124 (1988), *cert. denied*, 488 U.S. 851 (1988), in which the court held that, because arbitrary action is the " 'touchstone' " of due process, a plaintiff must allege " 'some element of abuse of governmental power.' " *Id.* at 1129 (quoting *Davidson* v. *Cannon*, 474 U.S. 344, 353 (1986)).

This test was easily satisfied by (among other things) the abusive inspections the respondents conducted, the regulatory approvals they maliciously withheld, and the mammoth

mid-year retroactive tax hike they levied on the Eichenlaubs' property. All of these actions were based on an improper motive—namely, Township officials' anger at the Eichenlaubs for publicly taking them to task during the development dispute.

After discovery, both sides moved for summary judgment. In a Report and Recommendation, the Magistrate Judge recommended that the Eichenlaubs' substantive-due-process claim proceed to trial. App. 92a. The Magistrate Judge relied on the Eichenlaubs' allegations, supported by record evidence, that the respondents had subjected them to "inconsistent interpretation and application of the Township's ordinances," vilified them at meetings, issued baseless citations, refused to sign crucial documents, and improperly increased their tax assessment by an order of magnitude. *Id.* 56a; *see generally id.* 53a-69a. Crucially, the Magistrate Judge found that these allegations sufficed to survive summary judgment under the *Bello* test: "[T]he aggregate factual scenario includes questions of improper motives and bias which must be resolved by a jury." *Id.* 92a.

4. The Magistrate's Report was transmitted to the District Court for consideration. But before that court could rule, the legal landscape shifted: On January 14, 2003, a panel of the Third Circuit discarded the *Bello* "improper motive" test. In *United Artists*, 316 F.3d at 400-401, the panel held, over a vigorous dissent, that the *Bello* standard had been displaced by this Court's 1998 decision in *Lewis*.

The *Lewis* case involved two young motorcyclists who led police on a high-speed chase that ended in tragedy: The motorcycle tipped over, and the trailing police car, unable to stop, rammed it from behind, killing a passenger. The decedent's family filed a substantive-due-process claim against the officers. Reversing the district court's judgment in favor of the officers, the Ninth Circuit panel concluded that the " 'appropriate degree of fault to be applied to high-

speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security.' " *Lewis*, 523 U.S. at 838 (quoting court of appeals opinion). The Ninth Circuit's decision created a circuit split over whether substantive-due-process claims in police-pursuit cases were governed by the "deliberate indifference" standard the Ninth Circuit adopted, or by a "shocks the conscience" standard, as other courts of appeal had held. *See id.* at 839-840 (listing cases on either side of the split, all involving police pursuits). In its petition for certiorari, the County framed the question presented as whether the appropriate substantive-due-process standard in police-pursuit cases is " 'shocks the conscience * * * or is 'deliberate indifference' or 'reckless disregard.' " *Id.* at 855-856 (Rehnquist, C.J., concurring in the conclusion "that 'shocks the conscience' is the right choice among the alternatives posed in the question presented").

This Court began by acknowledging the narrow issue before it: "We granted certiorari to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839 (citation omitted). Turning to the contours of substantive due process, the Court wrote that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *id.* at 845 (quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974)) (quotation marks omitted) (alteration in *Lewis*), and that it "ha[d] spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 846. The Court held that in a situation calling for split-second decision-making, only an intent to cause harm could shock the conscience:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. * * * They are supposed to act decisively and to show restraint at the

> same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." * * * [W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock * * * . [*Id.* at 853 (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986)).]

Because no such intent to cause harm had been alleged in *Lewis*, the Court concluded that the police officer's actions there did not violate the Constitution. *Id.* at 854.

Writing five years later, the Third Circuit's divided panel in *United Artists* held that *Lewis* had radically reshaped the law of substantive due process. Despite the avowedly narrow issue resolved by this Court in *Lewis*, the *United Artists* panel read *Lewis* to mean that the "shocks the conscience" test should henceforth apply not just to cases involving police pursuit (or to cases involving law enforcement generally), but instead to *all* executive action cases of any sort. 316 F.3d at 401. Because the "improper motive" test was "much less demanding" and "swe[pt] much more broadly" than "shocks the conscience," the panel wrote, it should be discarded. *Id.* at 400.

Judge Cowen dissented. He wrote that the majority's reliance on *Lewis* was "misguided" because the scenario there—a high-speed police chase—was "extremely far afield" from the land-use issues presented in *United Artists*. *Id.* at 405 (Cowen, J., dissenting). He went on to explain that extending *Lewis*'s "shocks the conscience" standard to every substantive-due-process claim would "leave[ ] the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office." *Id.* at 406-407. According to Judge Cowen, the "shocks the conscience" standard simply did not translate to the land-use context. Unlike police misconduct cases, "which tend to stir our

emotions," land use was "mundane"; in this context, the "shocks the conscience" standard had no meaning. *Id.* at 407. He predicted—accurately—that the district courts would struggle with the "awkward analogy" between *Lewis* and land-use cases, and that "[t]he confusion and potential for disparate results * * * will haunt us for years to come." *Id.*

Weeks later, the Third Circuit declined to rehear *United Artists*—a decision that drew another powerful dissent, this time from Judge Nygaard. *See United Artists Theatre Circuit, Inc.* v. *Township of Warrington*, 324 F.3d 133, 134 (3d Cir. 2003) (en banc) (Nygaard, J., dissenting from denial of rehearing and rehearing en banc). Judge Nygaard explained that there were "inherent problems with reading *Sacramento* v. *Lewis* as creating a blanket 'shocks the conscience' standard for all substantive due process claims." *Id.* That is because the test is appropriate in due-process cases only "where the actor cannot deliberate," since "[i]n those situations, exigencies may excuse" less exacting standards like "deliberate indifference." *Id.* at 135. But, of course, many—if not most—executive actions are "decisions [that] are not made in the heat of the moment without ability to deliberate." *Id.* To the contrary, "they are (or should be) deliberate decisions made after proper consideration." *Id.* For those actions, "[t]he appropriate standard, as repeatedly articulated before and after *Lewis*, is 'improper motive.' " *Id.*

5. In examining the Eichenlaubs' substantive-due-process claim, the District Court acknowledged that the Third Circuit's recent decision in *United Artists* controlled. The court therefore rejected the *Bello* "improper motive" test that the Magistrate Judge had relied on and instead applied the "shocks the conscience" standard. This made a dispositive difference. According to the District Court, "[t]he conduct alleged by the Eichenlaubs, while arguably (as reflected in the Report and Recommendation) a question of fact for the fact finder under the lesser 'improper motive' standard,

simply cannot * * * withstand summary judgment under the higher 'shocks the conscience' standard." App. 44a. It also entered judgment for the Township on the other counts in the Eichenlaubs' Complaint. *Id.* 47a.

On appeal, a panel of the Third Circuit reversed the District Court in part, remanding for further consideration of the Eichenlaubs' First Amendment retaliation claim, equal-protection claim, and claim for mandamus-related damages. *Id.* 1a (*"Eichenlaub I"*). The court, however, affirmed the District Court on substantive due process. The panel acknowledged the Eichenlaubs' allegations that "zoning officials applied subdivision requirements to their property that were not applied to other parcels; that they pursued unannounced and unnecessary inspection and enforcement actions; that they delayed certain permits and approvals; [and] that they improperly increased tax assessments." *Id.* 18a. The Third Circuit accepted, in other words, that the Eichenlaubs had alleged improper motive. But the court, applying *United Artists*, deemed these allegations inadequate because they "d[id] not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.' " *Id.* In so holding, the court observed that the Magistrate Judge had used the "improper motive" standard, that the "shocks the conscience" standard had been adopted by the "intervening decision" in *United Artists*, and that therefore the District Court had been "correct" to employ the "shocks the conscience" test. *Id.* 19a. It is this holding that the petitioners ask this Court to review on certiorari.[1]

---

[1] In a May 16, 2007 opposition to the Eichenlaubs' motion for an extension of time to file this petition, respondents argued that the Eichenlaubs did not contest the "shocks the conscience" standard below. Not so. The Eichenlaubs expressly (and successfully) advocated for the "improper motive" standard before the Magistrate Judge. Of course, by the time they filed their briefs in the Third Circuit, that court had already issued its decision in *United Artists*. It is well-settled that the Third Circuit "strictly adheres to

On remand, the case went to the jury on the retaliation and mandamus claims. App. 24a. The jury returned a verdict in favor of David Eichenlaub on the retaliation claim and in favor of Daniel and Barbara Eichenlaub on the mandamus claim. *Id.* 24a-25a. After trial, the District Court awarded the Eichenlaubs fees and costs. *Id.* 26a. The Third Circuit affirmed. *Id.* 27a ("*Eichenlaub II*"). The court denied rehearing and rehearing en banc on February 23, 2007, and the Eichenlaubs timely filed this petition for certiorari to challenge the Third Circuit's decision in *Eichenlaub I* to employ the "shocks the conscience" test in analyzing substantive-due-process claims.[2]

---

its Internal Operating Procedure 9.1 which provides: 'It is the tradition of this Court that the holding of a panel in a precedential opinion is binding on subsequent panels.' " *Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004). Thus in the Third Circuit, "*no* subsequent panel overrules the holding in a precedential opinion of a previous panel." *Id.* (emphasis added). The Eichenlaubs in their appellate briefs explained that they had at all times advocated for the "improper motive" standard, but acknowledged what was indisputable: "Recently, in *United Artists*, [the Third Circuit] adopted a 'shocks the conscience' standard for * * * claims of substantive due process rights regarding land use matters." Opening Brief of Appellants at 33. Given that the panel hearing the Eichenlaubs' appeal had no power to overrule or revisit the rule adopted by the *United Artists* panel, the Eichenlaubs were under no obligation to do anything more than they did to preserve the question: identify the standard they had consistently advocated but then argue the appeal under the controlling standard in the Third Circuit.

[2] Respondents also argued in their May 16 filing that this petition is untimely because it was not filed within 90 days of the Third Circuit's decision in *Eichenlaub I*. That is exactly wrong. It is hornbook law that this Court may grant certiorari from a second appellate decision in a given case and "may consider questions raised on the first appeal, as well as 'those that were before the court of appeals upon the second appeal.' " *Mercer* v. *Theriot*, 377

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO ALL SUBSTANTIVE-DUE-PROCESS CLAIMS INVOLVING EXECUTIVE ACTION.

The Third Circuit's decision in this case exacerbates an entrenched circuit split on a question federal courts regularly face: whether the "shocks the conscience" standard applies across the board to all executive action, or just to certain types of executive action. The Third Circuit below held that it applies universally to all executive action, joining the Tenth, Eleventh, and District of Columbia Circuits in embracing that categorical rule. But at least seven other circuits—the First, Second, Fourth, Fifth, Sixth, Seventh, and Ninth—have recognized and applied other yardsticks when evaluating certain types of executive action. This intractable seven-to-four circuit split is reason enough to grant the writ. *See* S. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"). And because the split has only intensified in the last year—with eight judges in the Ninth Circuit dissenting when that court refused to rehear *en*

U.S. 152, 153 (1964) (granting certiorari from second decision and considering questions resolved in first decision) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916)); *see also* Robert L. Stern *et al.*, *Supreme Court Practice* 359 (8th ed. 2002) ("Of course, where the question for Supreme Court review was resolved * * * on a first appeal in which a new trial was ordered, followed by a new trial and a second appeal to the lower court * * *, the 90-day rule does not bar review of the certiorari point decided on the first appeal * * * . [I]t is enough if certiorari is sought within 90 days following the second or last of the judgments rendered below.").

banc a decision that conflicts with the Third Circuit's approach—certiorari is particularly justified.

1. The decision below squarely conflicts with the decisions of other circuits that have expressly held that *Lewis*'s "shocks the conscience" standard does not apply to every substantive-due-process claim involving executive action. *See, e.g.*, *Kennedy* v. *City of Ridgefield*, 439 F.3d 1055, 1064 (9th Cir. 2006) ("We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference * * *.") (quotation marks, citation, and alteration omitted); *Davis* v. *Rennie*, 264 F.3d 86, 99 (1st Cir. 2001) (the nature of the executive action at issue "removes this case from the ambit of *Lewis* and its 'shocks the conscience' standard"); *cert. denied*, 535 U.S. 1053 (2002); *Khan* v. *Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) (concluding that the "shocks-the-conscience analysis [i]s not generally applicable to all substantive-due-process claims").

In *Khan* v. *Gallitano*, the Seventh Circuit considered—and rejected—the rule that "shocks the conscience" applies across the board. Underscoring the uncertainty that pervades this question, the Seventh Circuit observed that "[t]he courts have long struggled to identify the appropriate analysis for substantive-due-process claims." 180 F.3d at 833. It identified two substantive-due-process analyses used by this Court: the *Lewis* "shocks the conscience" test and the "fundamental rights and liberties" test adopted in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). Rejecting a one-size-fits-all approach, the Seventh Circuit held that the type of executive action at issue in *Khan* warranted a different standard than "shocks the conscience." According to the Seventh Circuit, "[t]he circumstance[ ] in *Lewis*, a high-speed chase where government officials had to make split-second decisions, has no resemblance to the situation in this case." *Id.* at 836. Unlike the Third Circuit—which thought that this Court's decision in *Lewis* articulated a universal standard for all substantive-due-process claims involving executive action—

the Seventh Circuit recognized that the *Lewis* Court "made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims." *Id.* (citing *Lewis*, 523 U.S. at 851). Accordingly, the court concluded "that the *Glucksberg* fundamental rights analysis generally applies in substantive-due-process cases, but for particular circumstances such as the high-speed chase in *Lewis* or pre-trial detention, the specialized analysis adopted for those circumstances would apply." *Id.*

Likewise, in *Davis* v. *Rennie*, the First Circuit rejected "shocks the conscience" in a case involving an involuntarily committed mental patient. The *Davis* court considered a substantive-due-process claim by a patient who, while being restrained by several mental-health workers, was punched repeatedly in the face by another worker. 264 F.3d at 92-94. At the close of trial, the defendants "asked the judge to instruct the jury that it could impose liability only if it found that the [defendants'] failure to intervene to protect [the plaintiff] involved behavior so extreme as to 'shock the conscience.'" *Id.* at 98-99. The trial court refused to give this instruction—a refusal the First Circuit affirmed on appeal. The court wrote that the defendants, "unlike the police officer in *Lewis*, did not face competing obligations between restoring order and exacerbating disorder." *Id.* at 99. The court wrote that that "factual element * * * removes this case from the ambit of *Lewis* and its 'shocks the conscience' standard." *Id.* Indeed, the court emphasized that "there is precedent for subjecting the conduct of a mental health worker to a more exacting standard than that of a prison guard controlling a riot or a police officer chasing a fleeing car." *Id.* (citing *Youngberg* v. *Romeo*, 457 U.S. 307, 321-322 (1982)). The court therefore held that "the trial court's decision to reject the 'shocks the conscience' standard is consistent with this distinction." *Id.* at 99-100.

Finally, just last year in *Kennedy* v. *City of Ridgefield*, the Ninth Circuit rejected the "shocks the conscience" standard

in evaluating whether a state-created danger violated substantive due process. In *Kennedy*, the defendant police officer received a complaint from a woman who said her daughter had been abused by a neighbor. 439 F.3d at 1057. Despite the complainant's warning that her neighbor was dangerous, the officer contacted the neighbor about the alleged abuse without notifying the complainant that he was doing so. *Id.* at 1058. That night, the neighbor broke into the complainant's home and shot her and her husband while they slept. *Id.* The defendant officer appealed from a denial of qualified immunity and the Ninth Circuit affirmed. In rejecting the qualified-immunity claim, the court reiterated that the standard to be applied was "deliberate indifference"—*not* "shocks the conscience." *Id.* at 1064. And like the Seventh Circuit in *Khan*, the Ninth Circuit emphasized that this approach was fully supported by precedent: "We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference, because the use of such subjective epithets as 'gross' 'reckless' and 'shocking' sheds more heat than light on the thought process courts must undertake in cases *of this kind*." *Id.* at 1064-1065 (quoting *L.W.* v. *Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)) (quotation marks and alteration omitted) (emphasis added).

The panel decision in *Kennedy* drew a strongly worded dissent, as did the court's subsequent denial of rehearing *en banc*. Eight judges would have reviewed the case *en banc* in part because they—like the Third Circuit below—considered it settled by this Court's decision in *Lewis* that "liability cannot attach here where no 'conscience shocking' abuse of power can be alleged." *Kennedy* v. *City of Ridgefield*, 440 F.3d 1091, 1094 (9th Cir. 2006) (en banc) (Tallman, J., dissenting from denial of rehearing and rehearing en banc) (citing *Lewis*, 523 U.S. at 850).

These three cases dramatize the entrenched split in the circuits over this important and recurring question. They also

illustrate the confusion that this split continues to sow. After all, eight judges of the Ninth Circuit within just the last year wrote separately to criticize the rule that the *Kennedy* panel articulated. These splits alone justify certiorari.

2. But the circuit split runs deeper still. Four other circuits—the Second, Fourth, Fifth, and Sixth—have adopted an approach to substantive-due-process claims that squarely conflicts with the categorical approach adopted by the Third Circuit: They apply the "shocks the conscience" test to some claims of executive action but not to others.

The Second Circuit, for example, has held that in some cases "only Government conduct that 'shocks the conscience' can violate due process." *United States* v. *Rahman*, 189 F.3d 88, 131 (2d Cir. 1999) (citing *Lewis*); *see also O'Connor* v. *Pierson*, 426 F.3d 187, 203 (2d Cir. 2005) (the test "when challenging executive action" is "shocks the conscience") (citing *Lewis*, 523 U.S. at 846); *Smith ex rel. Smith* v. *Half Hollow Hills Cent. School Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) ("The protections of substantive due process are available only against egregious conduct" that "shock[s] the conscience"). But the Second Circuit has applied an entirely different standard to several categories of executive-action substantive-due-process cases. In the land-use context, for instance, the court held as recently as April of this year that "[i]n order to prove that their right to substantive due process was violated" by government refusal to grant a given land-use permit or certificate, plaintiffs "must show (1) that they had a valid property interest in the certificate * * * and (2) that the Town infringed that interest in an arbitrary or irrational manner." *O'Mara* v. *Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *accord Clubside, Inc.* v. *Valentin*, 468 F.3d 144, 152 (2d Cir. 2006); *Harlen Assocs.* v. *Incorporated Village of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001).

The Fourth, Fifth, and Sixth Circuits take the same basic approach as the Second, which is to say each applies "shocks the conscience" to some types of executive action, but another test for other types of executive action. Thus, the Fourth Circuit has consistently held that a substantive-due-process violation in the land-use context requires a showing "(1) that [plaintiff] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Tri County Paving, Inc.* v. *Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (quoting *Sylvia Dev. Corp.* v. *Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995)); *accord Sunrise Corp. of Myrtle Beach* v. *City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1618 (2006).

Similarly, the Fifth and Sixth Circuits apply a rational-basis test when evaluating substantive-due-process claims in the land-use context. *See Simi Inv. Co., Inc.* v. *Harris County*, 236 F.3d 240, 250-251 (5th Cir. 2000) ("[W] e must ask next whether this denial is rationally related to a legitimate governmental interest."), *cert. denied*, 534 U.S. 1022 (2001); *Mikeska* v. *City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *Brody* v. *City of Mason*, 250 F.3d 432 (6th Cir. 2001). In *Brody*, for example, the Sixth Circuit ruled that "to sustain a substantive due process claim, in the context of zoning administrative action, 'a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the * * * [administrative] decision.'" *Id.* at 438 (quoting *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992)) (alteration in *Brody*).[3] The Sixth

[3] The First Circuit also declines to apply *Lewis* in land-use cases; it instead regularly has applied a disjunctive test that mentions the *Lewis* standard but can be met without conscience-shocking behavior. *See, e.g.*, *SFW Arecibo, Ltd.* v. *Rodriguez*, 415 F.3d 135,

Circuit also applies a rational-basis test in other executive-action situations, including a school board's denial of tenure to a teacher accused of misconduct. *See Flaskamp* v. *Dearborn Pub. Schs.*, 385 F.3d 935, 943 (6th Cir. 2004).

3. Although seven circuits have adopted a rule that conflicts with the Third Circuit's rule below, three other circuits—the Tenth, Eleventh, and District of Columbia Circuits—have embraced the Third Circuit's approach. *See, e.g., Camuglia* v. *City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006) (applying *Lewis* rubric in context of restaurant inspections); *Tinker* v. *Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005) (requiring substantive-due-process claimant to meet both *Lewis* test and *Glucksberg* "deeply rooted" test); *Fraternal Order of Police Dep't of Corrs. Labor Comm.* v. *Williams*, 375 F.3d 1141, 1145 (D.C. Cir. 2004) (applying *Lewis*). These circuits have, in other words, applied "shocks the conscience" across the board and have done so on the understanding that the test is a "general rule" governing executive-action cases. *Nix* v. *Franklin County Sch. Dist.*, 311 F.3d 1373, 1375 (11th Cir. 2002) (applying "shocks the conscience" to the case of a high school student who died during an in-school accident), *cert. denied*, 538 U.S. 946 (2003). The Eighth Circuit, for its part, apparently labors under an intra-circuit split: It has applied a rationality test in certain land-use cases, *see Iowa Coal Min. Co.* v. *Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001), while in other cases of the same type it has applied the "shocks the conscience" formulation, *see Koscielski* v. *City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006).

---

141 (1st Cir. 2005) ("[S]ubstantive due process prevents governmental power from being used for purposes of oppression, or abuse * * * that shocks the conscience, or action that is legally irrational") (internal citations omitted), *cert. denied*, 126 S. Ct. 829 (2005). That is hardly surprising, given that the First Circuit has explicitly held in other cases that *Lewis* does not apply universally. *See Davis*, 264 F.3d at 99. *See supra* at 15.

4. The circuits thus divide seven-to-four on the question presented by this petition. The Third, Tenth, Eleventh, and D.C. Circuits apply "shocks the conscience" across the board; their sister circuits (with the possible exception of the Eighth Circuit) do not. And the split has not gone unnoticed. Courts recognized a burgeoning divide even before *Lewis*, *see Pearson*, 961 F.2d at 1217, and the persistent confusion since *Lewis* was handed down has led commentators to note that the case "leaves lower courts guessing as to the proper analysis"[4] and that there is "wide variation among the circuit courts" as to which test applies.[5]

5. Nor is this split unique to the federal courts of appeals. Among the State courts of last resort, some have followed the Third Circuit and applied the "shocks the conscience" test across the board. *See, e.g.*, *Laughter* v. *Board of County Com'rs for Sweetwater County*, 110 P.3d 875, 891 (Wyo. 2005) (citing *United Artists* for the proposition that "the 'improper motive' standard * * * has been abrogated"). Others have followed the seven federal appellate courts that have taken the opposite tack. The South Dakota Supreme Court, for instance, has followed the First Circuit and adopted that court's disjunctive land-use test, asking whether government action is oppressive *or* conscience-shocking *or* irrational. *See Tri County Landfill Ass'n* v. *Brule County*, 619 N.W.2d 663, 668 (S.D. 2000) (citing *PFZ Props., Inc.* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. dis-*

---

[4] Matthew D. Umhofer, *Confusing Pursuits:* Sacramento v. Lewis *and the Future of Substantive Due Process in the Executive Setting*, 41 Santa Clara L. Rev. 437, 491 (2001).

[5] Parna A. Mehrbani, *Substantive Due Process Claims in the Land-Use Context: The Need For a Simple and Intelligent Standard of Review*, 35 Envtl. L. 209, 217 (2005); *see also id.* at 229 (cataloguing the "myriad" legal tests used by the federal circuits to evaluate substantive-due-process cases in land-use settings).

missed, 563 U.S. 257 (1992)). And other States have taken a similar approach.[6]

This Court should exercise its certiorari jurisdiction to resolve these deep divisions within the country. The Fourteenth Amendment's guarantee of substantive due process should mean the same thing in Pennsylvania as it does in California and everywhere in between.

II. THE THIRD CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S PRECEDENTS.

The rule adopted by the Third Circuit, and followed by a minority of other circuits, is also in direct conflict with this Court's substantive-due-process cases. Decades before this Court first articulated a "shocks the conscience" test in *Rochin* v. *California*, 342 U.S. 165 (1952)—a case that, like *Lewis*, involved police action—the Court had consistently held that substantive due process was offended by arbitrary, irrational government action. After *Rochin*, that framework continued to govern all substantive-due-process cases involving executive action except for two categories: those involving police and prisons. The Third Circuit erred in concluding that *Lewis* implicitly overruled this Court's earlier precedents. After all, "[t]his Court does not normally overturn, or * * * dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Illinois Council On Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). The Court should grant the writ and clarify that the "shocks the conscience" test is limited to the sorts of law enforcement scenarios at play in *Lewis* and *Rochin*. *See* S. Ct. R. 10(c) (certiorari is warranted when "a

---

[6] *See, e.g.*, *Blumenthal Inv. Trusts* v. *City of West Des Moines*, 636 N.W.2d 255, 266 (Iowa 2001) (applying "improper motive and by means that were pretextual, arbitrary and capricious, and * * * without any rational basis" standard) (quotation marks omitted); *Worsley Cos.* v. *Town of Mount Pleasant*, 528 S.E.2d 657, 660 (S.C. 2000) (applying "arbitrarily and capriciously deprived of a cognizable property interest" standard).

United States court of appeals * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court").

1. "[T]he Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (internal citations and quotation marks omitted) (quoting *Hurtado* v. *California*, 110 U.S. 516, 527 (1884)). That factor—*arbitrary* action of government, *i.e.* action "based on random choice or personal whim," *see* Compact Oxford English Dictionary of Current English (2005)—is the "touchstone" of due process protection. *Wolff*, 418 U.S. at 558.

The Court's substantive-due-process tests have never strayed from the basic notion that it is this sort of government behavior—arbitrary or irrational official action—that offends due process. Thus, in *Village of Euclid* v. *Amber Realty*, 272 U.S. 365 (1926), the Court explained that a zoning ordinance would violate substantive due process as applied if it were "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare." *Id.* at 395. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court reiterated this test, holding that landowners have a substantive-due-process right "to be free of arbitrary or irrational zoning actions." *Id.* at 263. And in *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court wrote that "[w]here property interests are adversely affected by zoning, the courts * * * have sustained the regulation if it is rationally related to legitimate state concerns." *Id.* at 68. Nowhere in these cases, or in others like them, did the Court mention "shocks the conscience."

2. The phrase "shocks the conscience," in fact, has made an appearance in only a handful of this Court's substantive-due-process cases. The test originated in *Rochin*, a case in

which police officers forcibly pried open a suspect's mouth and later pumped his stomach to obtain drug evidence. The Court held that this sort of behavior violated substantive due process, characterizing the police action as "conduct that shocks the conscience." 342 U.S. at 172. But the Court gave no hint that this formulation was intended to abrogate the well-settled substantive-due-process approach it had charted in the decades leading up to *Rochin*.

Indeed, the phrase "shocks the conscience" reappeared only sporadically over the next 40 years—and always in the context of police or prisons. Thus in *Breithaupt* v. *Abram*, 352 U.S. 432, 435 (1957), the Court used the test to evaluate a police-misconduct claim by a suspect whose blood was taken against his will. In *Whitley*, 475 U.S. at 327, the Court addressed a claim by a prisoner shot in the leg during a prison riot. And in *United States* v. *Salerno*, 481 U.S. 739, 746 (1987), the test was mentioned in evaluating a claim that certain pretrial detention practices were unconstitutional.[7]

3. Nothing in *Lewis* suggests—much less holds—that "shocks the conscience" is to be applied across the board to every type of executive action when evaluating a substantive-due-process claim. To the contrary, the Court in *Lewis* carefully followed its established practice of limiting the "shocks the conscience" test to executive actions that actually

---

[7] In *Collins* v. *City of Harker Heights*, 503 U.S. 115 (1992), this Court considered a claim by a sanitation-department employee who died of asphyxia after entering a manhole to unstop a sewer line. In considering his wife's substantive-due-process claim against the city, the Court mentioned "shocks the conscience" in passing. *Id.* at 128. But the Court clarified that this claim was evaluated under the same standard the Court has always used for non-police executive action: arbitrariness and rationality. Thus, the Court explained that its "refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process." *Id.*

implicate police conduct. Thus, the Court clarified that it had granted certiorari "to resolve a conflict among the Circuits over the standard of culpability *on the part of a law enforcement officer* for violating substantive due process *in a pursuit case*." 523 U.S. at 839 (emphases added). And confirming that it intended no radical revision to existing precedent, the Court emphasized that the narrow "issue in th[e] case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender," or whether the officer is liable in that event only if he engages in conduct that "shock[s] the conscience." *Id.* at 836. *See also id.* at 855-856 (Rehnquist, J., concurring) (joining the Court in "concluding that 'shocks the conscience' is the right choice among the alternatives posed in the question presented").

In light of this language, many of the federal appeals courts read *Lewis* as limited to the specific type of executive action at issue there and its close analogs. For example, the Seventh Circuit has held that the "shocks the conscience" test is a "specialized analysis" to be used in "particular circumstances such as the high-speed chase in *Lewis* or pre-trial detention." *Khan*, 180 F.3d at 836. More recently, that court again emphasized that it is "*[i]n the context of the action of law enforcement authorities*" that the applicable test "'is most often described as an abuse of government power which shocks the conscience.' " *Christensen* v. *County of Boone*, 483 F.3d 454, 468 (7th Cir. 2007) (emphasis added) (quoting *Tun* v. *Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005)). The Second Circuit has similarly acknowledged that *Lewis* answered a narrow question: What is the appropriate "standard by which to determine whether a plaintiff's due process rights have been violated *by police use of excessive force*." *Salamacha* v. *Lynch*, 165 F.3d 14, 1998 WL 743905, at *2 (2d Cir. 1998) (table disposition) (emphasis added). Com-

mentators have drawn the same conclusion, noting that "the Supreme Court's stated reason for its decision to grant certiorari in the *Lewis* case * * * was just about as narrow as possible." Mehrbani, *supra*, at 226 (citing *United Artists*, 316 F.3d at 405 (Cowen, J., dissenting)). And since *Lewis*, the Court has mentioned "shocks the conscience" in only one substantive-due-process case, *Chavez* v. *Martinez*, 538 U.S. 760 (2003), which, like the others, revolved around law-enforcement misconduct (this time the allegedly coercive interrogation of a wounded suspect).

4. There are good reasons why this Court has never extended "shocks the conscience" beyond its original police-and-prisons context. As Justice Kennedy explained in his concurring opinion in *Lewis*, "[t]he phrase has the unfortunate connotation of a standard laden with subjective assessments." *Lewis*, 523 U.S. at 857-858 (Kennedy, J., concurring); *see also id.* at 861 (Scalia, J., concurring in the judgment) (criticizing the "shocks the conscience" test as the "*ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity"). That amorphous standard may suffice when evaluating police actions or prison conditions—both capable of precipitating visceral reaction—but it offers little insight for evaluating governmental abuses that may be less spectacular but equally egregious or arbitrary. The test therefore gives short shrift to claims alleging such abuses. As Judge Cowen explained in his dissent from the *United Artists* panel decision, "shocks the conscience" might be useful in a highly charged circumstance—for example, a police shooting—because such cases "stir our emotions and yield immediate reaction," but it is meaningless to ask whether one's conscience has been shocked when "lifeless property interests * * * are involved." 316 F.3d at 407 (Cowen, J., dissenting).

Moreover, as Judge Nygaard emphasized in his dissent from the denial of rehearing *en banc* in *United Artists*, " '[s]hocks the conscience' is useful in due process cases

where the actor cannot deliberate." 324 F.3d at 135 (Nygaard, J., dissenting). That is because, "[i]n those situations, exigencies may excuse" a state actor's failure to comply with more exacting standards like "deliberate indifference." *Id.* But for the vast majority of executive actions, "decisions are *not* made in the heat of the moment without ability to deliberate." *Id.* (emphasis added). To the contrary, "they are (or should be) deliberate decisions made after proper consideration." *Id.* For those types of executive action, "[t]he appropriate standard, as repeatedly articulated before and after *Lewis* is 'improper motive.' " *Id.*

Eichenlaub I illustrates how extending "shocks the conscience" beyond its traditional sphere distorts the substantive-due-process inquiry. The panel, applying the new test, rejected the Eichenlaubs' substantive-due-process claim in part because "there [was] no allegation of corruption or self-dealing" against the Township officials. App. 18a. But there is no reason why punitive and baseless government actions against a landowner should be actionable if taken for reasons of greed, but not if taken for reasons of revenge or other ill motives. As Judges Nygaard and Cowen both pointed out, *all* government "actions carried out with improper motive" are by necessity "so egregious * * * as to violate the Constitution." *United Artists*, 324 F.3d at 135 (Nygaard, J., dissenting from denial of rehearing en banc); *see also United Artists*, 316 F.3d at 407 (Cowen, J., dissenting) (decisions that are otherwise of local concern "*necessarily* assume constitutional dimension when the calculated, intentional, and deliberate abuse of government power is at hand") (enphasis in original). Such actions are, in a word, arbitrary. Yet the "shocks the conscience" test will capture some and not others, because it relies on a court's subjective sense of outrage to determine whether or not an abuse is actionable. It thus "leaves the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office." *Id.* at 406-407.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Substantive-due-process cases are ubiquitous in the federal courts. A database search reveals nearly 2,000 appellate cases mentioning the doctrine in the nine years since *Lewis* was decided. The differing standards that the federal courts of appeals have adopted to resolve these substantive-due-process claims have led to confusion and a glaring lack of uniformity throughout the Nation. Because the question whether governmental conduct violates the Constitution should not turn on accidents of geography, this Court should grant the writ and bring much-needed clarity and uniformity to this important area of the law.

There is no question that the differing standards being employed in the lower courts of appeals are often outcome-determinative. After all, government action may be "arbitrary" or even "irrational" without shocking the conscience. The Eichenlaubs' case is a perfect example of why the correct standard matters. Their substantive-due-process claim, which the Magistrate Judge had concluded should survive summary judgment under the "improper motive" standard, App. 92a, was deemed a dead letter when "shocks the conscience" was applied. App. 44a. Given that a majority of the circuits apply arbitrariness or rationality review in at least some subset of substantive-due-process cases, and given that the federal appellate courts review dozens (sometimes hundreds) of substantive-due-process cases each year, the inescapable conclusion is that many federal-court litigants receive differing brands of constitutional justice depending on whether they happen to file their claims in a circuit that reads *Lewis* broadly or narrowly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GERRI L. SPERLING
METZ LEWIS L.L.C.
11 Stanwix Street
18th Floor
Pittsburgh, PA 15222
(412) 918-1165

*Counsel of Record

CATHERINE E. STETSON
CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT

No. 03-2707

David EICHENLAUB; Ike Construction; Daniel Eichenlaub; Barbara Eichenlaub,

Appellants

v.

TOWNSHIP OF INDIANA; Township of Indiana Board of Supervisors; Dorothy T. Claus; George E. Dull, Jr.; Charles R. Federoff; Jeffrey D. Peck; Daniel L. Taylor, in their official capacities; Township of Indiana Code Enforcement Officer, Jeffrey S. Curti, in his official capacity; Dan Anderson, in his official capacity; Mildred Brozek, Administratix of the Estate of Kevin Brozek; Township of Indiana Engineer, Daniel B. Slagle, in his individual and official capacity.

Argued: March 26, 2004

Filed: Sept. 21, 2004

Before: AMBRO, CHERTOFF, and BECKER, Circuit Judges.

Affirmed in part, reversed in part, and remanded.

OPINION

CHERTOFF, Circuit Judge.

Appellants, members of the Eichenlaub family and their family-owned business, have been embroiled in a contentious zoning dispute with Appellees, the Township of Indiana, Pennsylvania, and several of its officials. The controversy arises from the Eichenlaubs' desire to develop certain pieces of property, and from the Township's insistence that the development comply with a number of regulations. The disagreement has engendered claims that Township officials violated the Eichenlaubs' substantive due process and equal protection rights by denying or delaying authorization to develop the properties; that officials violated David Eichenlaub's First Amendment petition and free speech rights by curtailing his speech during a public meeting and removing him from the meeting; that officials retaliated against David Eichenlaub for exercising his First Amendment rights; and that officials are also liable under Pennsylvania state law for damages.

The District Court granted summary judgment on the substantive due process, equal protection, and First Amendment charges but denied the Eichenlaubs' mandamus claim as moot. We affirm the District Court's judgment with respect to the substantive due process and free speech and petition claims. However, we will reverse as to the First Amendment retaliation, equal protection, and writ of mandamus claims.

I.

David, Daniel, and Barbara Eichenlaub own two parcels of property in Indiana Township: seven lots in the Fairview Gardens Plan and a separate tract of land located along Saxonburg Boulevard. In the mid-1990s, the Eichenlaubs commenced plans to develop their Fairview Gardens property, which was part of a twenty-seven lot subdivision of

single family residences approved by the Allegheny County Planning Commission and the Board of Supervisors of the Township in 1940 (the "Plan"). In April of 1999, the Eichenlaubs submitted an application to the Township for approval of a revised Plan related to the seven lots (the "Revised Plan"). After several rejections and subsequent revisions, the Township approved the Eichenlaubs' amended subdivision plan on June 22, 1999, conditioned upon an execution of a satisfactory developer's agreement. However, several weeks later, the Eichenlaubs withdrew their Revised Plan, claiming that they had been subject to "unnecessary and onerous obligations" by the Township. Appellant Br. 12.

Following the withdrawal of their revised plan application, the Eichenlaubs continued their development efforts for their Fairview Gardens lots. On August 19, 1999, Daniel and Barbara Eichenlaub executed deeds granting two of the Fairview Gardens lots to family members, David and Carl Eichenlaub. One week later, David Eichenlaub submitted a building permit application for a single family residence on Lot 7 of the Plan. The Township rejected that application, as well as a subsequent application filed on August 3, 2000, claiming that the family was trying to develop the seven residential lots in a serial fashion so as to claim colorable exemption from the requirements of the Township Subdivision and Land Development Ordinance.

The Eichenlaubs maintained that they were not required to obtain the Township's approval of their subdivision plans under the then-current land development regulations. They claimed that because the Fairview Gardens subdivision development was part of the twenty-seven lot plan approved in 1940, subsequent revisions to the development codes did not apply to them. The Township argued otherwise and maintained that the Eichenlaubs were obliged to comply with

development regulations enacted following the original subdivision approval granted in 1940.[1]

The Eichenlaubs also sparred with Township officials over the development of their Saxonburg Boulevard property. In 1998, the Eichenlaubs filed a permit application to grade the property to plant nursery stock for their landscaping business. The following year, the Eichenlaubs fulfilled a Township request to file a site plan for the project. In June of 2000, the Board approved the Eichenlaubs' plan. However, the Township had not executed the Developer's Agreement because, as the Magistrate Judge found, the Eichenlaubs have refused to pay the engineering fees for the project. App. A37.

In September of 1999, the Eichenlaubs filed two separate civil actions in federal court. In the first case, docket 99-cv-01607, the Township, the Township Board of Supervisors, the Township Board Code Enforcement Officer, the Township Manager and the Township Engineer were named defendants. David Eichenlaub alleged that the Township violated his First Amendment rights to petition government for redress of grievances when he was limited in his right to speak at a public meeting on September 14, 1999, and was removed from the same meeting[2] (Count I) and was subject to various alleged retaliatory actions taken by the

---

[1] The Township's position has been that the Eichenlaubs were required to comply with the requirements of the current Subdivision Ordinance (enacted in 1980), the Township Grading Ordinance (enacted in 1987), and the Stormwater Management Ordinance (enacted in 1988).

[2] David Eichenlaub contends that at the September 14, 1999 meeting, board chairman Peck also "repeatedly interrupted him and did not let him finish his comments." Appellant Br. 22. He also claims that Peck had called him earlier on August 25, 1999, and suggested that he "not come back and speak at the Township meetings, at the citizens forum." *Id.* Finally, David Eichenlaub's complaint, 99-1607, asserts without any specificity that the Township hindered him from speaking at meetings.

Defendants (Count II). David Eichenlaub and his business, Ike Construction, also asserted defamation claims regarding Defendants' involvement in a newspaper article recounting that David Eichenlaub had violated an Indiana Township Ordinance (Count II).

In the second case, docket 99-cv-01667, David, Daniel, and Barbara Eichenlaub raised conspiracy claims under 42 U.S.C. § 1983 asserting: (1) violation of their Fourteenth Amendment rights to substantive due process (Count I) arising out of delays and disputes in securing authorization to develop the Fairview Gardens and Saxonburg Boulevard properties; and (2) denial of equal protection under the Fourteenth Amendment by being denied the opportunity to proceed with their projects (Count II); and (3) arbitrary action, selective enforcement and retaliation regarding both the Fairview Gardens and Saxonburg Boulevard properties (Count III). The Eichenlaubs also alleged that the Defendants' failure to act on their development applications in the time and manner required under the Pennsylvania Municipalities Planning Code ("MPC") entitled them to a writ of mandamus compelling approval of those projects (Count IV).

The two complaints were consolidated at 99-cv-01667. The Defendants moved for summary judgment on all counts, and the Eichenlaubs moved for partial summary judgment on the counts initially listed in 99-cv-01667.

On August 27, 2002, the Magistrate Judge issued his Report and Recommendation. The report recommended that the District Court: (1) Grant summary judgment for Defendants on David Eichenlaub's First Amendment free speech and petition claim as well his state defamation claim; the Eichenlaubs' equal protection, conspiracy, and official capacity claims alleged against the individual Defendants; (2) deny Defendants' motions for summary judgment on the David Eichenlaub's First Amendment retaliation claims; (3) deny motions by the Eichenlaubs and Defendants for

summary judgment on the Eichenlaubs' substantive due process claim; and (4) grant the Eichenlaubs' request for a writ of mandamus based on (a) Defendants' failure to notify the Eichenlaubs of its April 1999 decision to deny approval of the subdivision plan for Fairview Gardens and (b) Defendant's failure to act on the Eichenlaubs' grading permit and site plan applications for the Saxonburg Boulevard property.

While the case was pending in District Court, the parties entered into two partial settlement agreements, dated February 12, 2003, and February 24, 2003, under which the Township agreed to grant building permits at Fairview Gardens and approve the subdivision plan and grading permits for the Saxonburg property.

On May 29, 2003, the District Court entered an order granting Defendants' motion for summary judgment on all counts. The Court also dismissed the Eichenlaubs' mandamus requests as moot in light of the partial settlement agreements.

The Eichenlaubs appeal from that order as it relates to the § 1983 claims for substantive due process, equal protection, free speech, and retaliation as well as the denials of mandamus. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Our review over a District Court's grant of summary judgment is plenary. *See Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 443 (3d Cir. 2003). We assess the record using the same summary judgment standard that guides district courts. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000). To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

II.

David Eichenlaub's First Amendment claims present two distinct issues. He complains that the Township restricted

his ability to speak at various Township Board of Supervisors Meetings and that he was removed from one such meeting on September 14, 1999. In effect, David Eichenlaub alleges a direct restraint on speech in a particular public forum, as well as a restraint on his ability to petition under the Petition Clause of the First Amendment. Second, David Eichenlaub urges that Township officials took adverse action against his family in retaliation for his statements. We examine each claim in turn.

A.

The government's power to prevent or limit speech on public property is carefully circumscribed by the First Amendment. Not all public property is open to unfettered public speech, for the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Government facilities that are not committed to public communicative activity may regulate speech by the general public so long as that regulation is reasonable and not based on opposition to a particular viewpoint. *Id.* at 131 n. 7, 101 S.Ct. 2676.

That is because the government "may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993).

On the other hand, public areas that are open to general "assembly and debate" as a matter of tradition or by specific government designation are characterized as a public forum, within which speech can be limited only narrowly. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998), quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 182 n. 2 (3d Cir. 1999). Streets and parks are examples of traditional public forums. *See, e.g., Hague v. CIO*, 307 U.S.

496, 515 (1939). Public forums are also established when the government opens property for general "expressive activity," *Perry Educ. Ass'n*, 460 U.S. at 45, as in the case of theaters, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). Absent a compelling interest, speech in a public forum may not be regulated based upon content. Furthermore, in a public forum any restrictions as to time, place, and manner of speech (1) must be unrelated to content; (2) must be " 'narrowly tailored to serve a significant governmental interest' "; and (3) must allow alternative ways of communicating the same information. *Whiteland Woods*, 193 F.3d at 182 n. 2 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

There is a third type of public setting that the courts have recognized—a forum created by the government that is limited to certain groups or to discussion of certain topics. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel*, 508 U.S. at 392-93, 113 S.Ct. 2141. An example of this kind of limited public forum is a university facility open for meetings of student groups, but not for the general public. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268 (1981). The Supreme Court has not precisely instructed where the limited public forum is located on the First Amendment spectrum between the strict test for public forum regulation and the more relaxed test for nonpublic regulation. *See Whiteland Woods,* 193 F.3d at 182 n.2. Earlier decisions, such as *Widmar* itself, 454 U.S. at 269-70, 102 S.Ct. 269, and *Perry Educ. Ass'n*, 460 U.S. at 45-46 & n. 7, suggest that content-based restraints on limited public forums must be subject to strict scrutiny, and can survive only if they are supported by a compelling interest. Recently, however, the Court has apparently moved to the position that regulation of a limited forum may survive under a test that is less strict than that applied in the case of a general open forum. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). Under this refined test for reviewing limited forum restrictions,

content-based restraints are permitted, so long as they are designed to confine the "forum to the limited and legitimate purposes for which it was created." *Rosenberger,* 515 U.S. at 829; *see also Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992). Two limitations remain. Any restrictions on speech must be viewpoint neutral and must be " 'reasonable in light of the purpose served by the forum.' " *Good News Club*, 533 U.S. at 106-07 (quoting *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

Put another way, we may say that under contemporary public forum jurisprudence, a designated (as opposed to traditional) forum is reviewed under a sliding standard that allows for content-related regulation so long as the content is tied to the limitations that frame the scope of the designation, and so long as the regulation is neutral as to viewpoint within the subject matter of that content.

In this case, the primary restrictions placed on David Eichenlaub's speech occurred during his appearance at the citizen's forum portion of the Township Board of Supervisors meeting on September 14, 1999, during which he was eventually removed. Whether the citizen's forum was a general public forum or a limited public forum is a close question. Certainly, the citizen's forum is not limited to a particular class of speakers, as was the case in *Cornelius* (charities), *Rosenberger* (student groups), or *Forbes* (political candidates). Indeed, the record discloses that the citizen's forum—as its name suggests—is open to all citizens who wish to address the Township government. At the same time, a review of the transcript of the forum confirms that even the public discussion session of the Township meeting was designed to be limited to matters pertaining to town government. The meeting was not the equivalent of a municipal theater, as in *Southeastern Promotions*, or a public park or street. One would certainly not expect the forum of a Township meeting to include such expressive activities as performance art, lectures on medieval history, or arguments

about private disputes involving town citizens. "Plainly, public bodies may confine their meetings to specified subject matter. . . ." *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 n. 8 (1976); *see White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). Thus, matters presented at a citizen's forum may be limited to issues germane to town government.

With this framework, we agree with the District Court that summary judgment against David Eichenlaub on his restraint of speech and petition claims was appropriate. The record of the September 14, 1999 meeting discloses that he was repetitive and truculent, and that he repeatedly interrupted the chairman of the meeting. Restricting such behavior is the sort of time, place, and manner regulation that passes muster under the most stringent scrutiny for a public forum. Indeed, for the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants. We have no difficulty sustaining the decision to remove David Eichenlaub on that basis.

To be sure, the chairman of the meeting sought to restrict the discussion to topics of public interest and requested that David Eichenlaub not discuss matters of private concern. To the extent those restrictions were not strictly content-neutral, the chairman's actions served the function of confining the discussion to the purpose of the meeting. As we have observed, speech at a citizen's forum may be limited according to its germaneness to the purpose of the meeting.[3] At any rate, the overwhelming, and wholly sufficient, motive to eject David Eichenlaub from the meeting was the perfectly sustainable and content-neutral desire to prevent his

---

[3] Of course, viewpoint-based regulation is not proper. We do not read the record of the proceedings to indicate that the presiding officer attempted to muzzle David Eichenlaub because he disagreed with Eichenlaub's viewpoint. App. A1225-35.

badgering, constant interruptions, and disregard for the rules of decorum.

We will affirm summary judgment for the defendants on this claim.

B.

The Eichenlaubs' retaliation claims stand on different footing, however. The Magistrate Judge determined that there were material issues of fact as to whether the defendants took steps to retaliate against the Eichenlaubs for David Eichenlaub's various statements and complaints, including his speech at the September 14, 1999 meeting. The District Court entered summary judgment against the Eichenlaubs, however, on the ground that, even if there was retaliation, the speech in question related to private matters, rather than matters of public concern, and, therefore, was unprotected by the First Amendment.[4]

The District Court's opinion misconceives the scope of protection for speech under the First Amendment.

The issue of government retaliation for unwelcome communication arises in various contexts. Sometimes, public employees claim adverse employment action resulted because of their speech. Prisoners not infrequently allege that punishment was spurred by their complaints. And, as is the case here, citizens may charge that the government hurt them in retaliation for some criticism against the authorities. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 671-72 (1996).

In general, constitutional retaliation claims are analyzed under a three-part test. Plaintiff must prove (1) that he engaged in constitutionally-protected activity; (2) that the

---

[4] Appellants challenge the District Court's determination that David Eichenlaub's speech was not about matters of public concern. Since we determine that the public concern test is not applicable, we need not address this challenge.

government responded with retaliation; and (3) that the protected activity caused the retaliation. *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997) (public employee retaliation); *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001). The threshold requirement is that the plaintiff identify the protected activity that allegedly spurred the retaliation. In this case, David Eichenlaub argues that his exercise of his freedom of speech and ability to petition the government under the First Amendment are the protected activities in question.

The District Court relied in part on our opinion in *Anderson* to hold that "plaintiff must show that speech is a matter of public concern in order to receive First Amendment protection." App. A17 (quoting *Anderson*, 125 F.3d at 162). This reading of our case law, however, is overbroad. Our decision in *Anderson*—and all the other decisions relied upon in the District Court or by the parties—provide only that a "public concern" requirement applies when a claim of First Amendment retaliation is brought by a public employee against his or her government employer. *Anderson*, 125 F.3d at 162. The speech on public concerns requirement embodied in these decisions has not been applied, however, when non-employees complain that government has retaliated against them *as citizens* for their speech. To expand this public concern limitation into the broader context of all citizen speech would wrench it from its original rationale and curtail a significant body of free expression that has traditionally been fully protected under the First Amendment.

We begin with the proposition that, except for certain narrow categories deemed unworthy of full First Amendment protection—such as obscenity, "fighting words" and libel—all speech is protected by the First Amendment. *R.A.V. v. St. Paul*, 505 U.S. 377, 382-90 (1992). That protection includes private expression not related to matters of public concern. *See Capitol Square Review & Advisory*

Bd. v. Pinette, 515 U.S. 753, 760 (1995); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967).

The "public concern" test was formulated by the Supreme Court in addressing speech restrictions placed by governmental entities on their own public employees. Regulation of public employee speech presented two features not present in other forms of speech control. First, acting as an employer, the government has some authority to impose conditions upon those who seek jobs, including conditions that limit the exercise of otherwise available constitutional rights. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. 601 (1973). Second, "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion).

The Supreme Court approached public employee speech, therefore, as a balance between the rights those employees enjoy as citizens and the obligations they bear as loyal employees. In *Connick v. Myers,* 461 U.S. 138 (1983), the Court held that while government employers, like their private counterparts, have authority to manage their workers—including the authority to restrict various kinds of expression—the First Amendment imposes limits on that authority when the employees are speaking about matters of public concern. To strike the balance, the Court carved out speech on matters of public concern as a species of expression that would remain protected even for government employees. The Court reasoned that speech on public issues "occupies the 'highest rung of the hierarchy of First

Amendment values,' and is entitled to special protection." *Id.* at 145 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).[5]

Nothing about the reasoning of *Connick* suggests that this public/private concern distinction has any role to play regarding speech outside the public employment setting.

To the contrary. In singling out speech on matters of public concern for the highest protection in the government workplace, the Supreme Court took pains to avoid any implication that speech on private matters is not entitled to constitutional protection:

> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[The] First Amendment does not protect speech and assembly only to the extent it can be characterized as political. . . .

Id. at 147 (quoting *United Mine Workers of Am. Dist. 12*, 389 U.S. at 223). Thus, the Court distinguished between types of speech only in order to accommodate the strong countervailing need for governments to discipline their own personnel.

This Court has also observed, albeit in dictum, that "[s]peech unrelated to a matter of public concern is not, like obscenity, entirely outside the protection of the First Amendment. While the government as employer may discharge a public employee for such speech, the government as sovereign may not sanction the same individual when she

---

[5] That special status for speech about matters of public interest drew support from other lines of First Amendment case law that gives extraordinary protection to even defamatory speech and invasions of privacy when they concern public figures or matters of public interest. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-59 (1985); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967).

engages in such speech as a citizen, outside the employment context." *Azzaro v. County of Allegheny*, 110 F.3d 968, 976 n. 3 (3d Cir. 1997).

To be sure, numerous cases, including those cited by the District Court and by the parties, have reiterated the public/private matters distinction in the context of retaliation claims brought by public employees. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Anderson*, 125 F.3d at 160-61 (3d Cir. 1997); *Kokkinis v. Ivkovich and Vill. of Bridgeview*, 185 F.3d 840 (7th Cir. 1999); *Russoli v. Salisbury Township*, 126 F.Supp.2d. 821 (E.D. Pa. 2000); *Alvarez v. City of New York*, 31 F.Supp.2d 334 (S.D.N.Y. 1998). What is pivotal, though, is that these cases do not involve retaliation by government bodies against citizens who are not employed by the government (and who, incidentally, cannot be viewed as having limited their speech as a condition of voluntary employment).[6] Indeed, many other cases point to the principle that outside the employment context the First Amendment forbids retaliation for speech even about private matters. For example, we have held that First Amendment claims may be based on allegations that a prisoner's complaint against a guard caused retaliation. *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003). Realistically, these kinds of complaints are often highly particularized objections to alleged individual mistreatment. We do not, however, impose a "public concern" threshold.

In short, while speech on topics of public concern may stand on the "highest rung" on the ladder of the First Amendment, private speech (unless obscene or fighting words or the like) is still protected on the First Amendment

---

[6] The District Court did rely upon *Grimm v. Borough of Norristown*, 226 F.Supp.2d 606, 636 n. 19 (E.D. Pa. 2002), in which another District Court translated the public concern requirement from the public employee setting to the zoning setting. That opinion is, of course, not binding on us, and for the reasons stated here, we disagree.

ladder. *See Capitol Square Review*, 515 U.S. at 760. The rationale for a public/private concern distinction that applies to public employees simply does not apply to citizens outside the employment context. By the same token, the decisions of the Supreme Court and of our court have not established a public concern threshold to the protection of citizen private speech. We decline to fashion one now. "[C]onstitutional review of government employment decisions must rest on different principles that review of speech restraints imposed by the government as sovereign." *Waters*, 511 U.S. at 674.

Accordingly, David Eichenlaub's speech, even if concerned with private grievances, is entitled to First Amendment protection.[7]

Because the District Court did not consider the Magistrate's Report that found material issues of fact with regard to the other elements of the retaliation claim, we will vacate the judgment on the First Amendment retaliation claim and remand for further proceedings.

III.

A.

The District Court properly held, and the Eichenlaubs do not dispute, that whether a zoning official's actions or inactions violate due process is determined by utilizing a "shocks the conscience" test. *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 399 (3d Cir.

---

[7] The District Court opinion also overlooked the fact that the Eichenlaubs raised claims of retaliation for the exercise of rights under the Petition Clause of the First Amendment. We held in *San Filippo v. Bongiovanni*, 30 F.3d 424 (1994), that under the Petition Clause, the filing of a "non-sham" petition was protected activity in the public employee context—without regard to the "public concern" test. In view of our disposition, we need not address whether the Petition Clause creates broader rights than the Free Speech Clause in the non-employee context. *See id.* at 449 (Becker, J., dissenting).

2003). That test, of course, is not precise, *see County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998), and it also "varies depending on the factual context," *United Artists*, 316 F.3d at 400. What is clear is that this test is designed to avoid converting federal courts into super zoning tribunals. What "shocks the conscience" is " 'only the most egregious official conduct.' " *Id.* (quoting *Lewis*, 523 U.S. at 846).

Cases cited by the Eichenlaubs in support of their argument illustrate the kinds of gross misconduct that have shocked the judicial conscience. In *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337 (5th Cir. 2001), the Court of Appeals determined that whether a plaintiff's substantive due process had been violated by local officials was a triable allegation. But that was not a zoning dispute. Rather, plaintiffs charged that the officials fraudulently converted a tax levy for a $75,000 deficiency into an unauthorized seizure and forced sale and destruction of an $800,000 ongoing business. The principal defendant conceded that the sale was unauthorized. The facts carried a whiff of self-dealing, since the principal defendant's friends were alleged to have been engaged to perform auction services. In effect, the court found that the facts asserted amounted to a claim of an unconstitutional "taking" without just compensation, in violation of the Fifth Amendment, or an improper seizure, in violation of the Fourth Amendment. *Id.* at 340 n. 9.

Associates in Obstetrics & Gynecology v. Upper Merion Township, 270 F.Supp.2d 633 (E.D. Pa. 2003), is also a case that implicates more than just disagreement about conventional zoning or planning rules. In *Obstetrics*, the District Court denied a motion to dismiss a claim that municipal defendants denied substantive due process when they selectively closed plaintiff's medical office for the purpose of blocking the provision of abortion services. Because the municipal action there implicated abortion rights, the District Court's analysis of the "shocks the conscience" standard proceeded largely under those judicial decisions that

address protection of abortion services under the Fourteenth Amendment. That analysis is inapplicable to a zoning controversy that does not involve allegations of hostility to constitutionally-protected activity on the premises.[8]

By way of contrast, as the District Court found, the misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the "shocks the conscience test."[9] Basically, the Eichenlaubs assert that zoning officials applied subdivision requirements to their property that were not applied to other parcels; that they pursued unannounced and unnecessary inspection and enforcement actions; that they delayed certain permits and approvals; that they improperly increased tax assessments; and that they maligned and muzzled the Eichenlaubs. With the exception of the previously discussed First Amendment retaliation claims, these complaints are examples of the kind of disagreement that is frequent in planning disputes. As counsel for appellants acknowledged during argument, there is no allegation of corruption or self-dealing here. The local officials are not accused of seeking to hamper development in order to interfere with otherwise constitutionally protected activity at the project site, or because of some bias against an

---

[8] Two other decisions relied upon by the Eichenlaubs are just inapposite. *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988), which involved allegations that defendants were making zoning decisions to harm members of an opposing political party, was decided before *Lewis* and under a different legal standard than the "shocks the conscience" test. *Rubinovitz v. Rogato*, 60 F.3d 906 (1st Cir. 1995), is an equal protection case, not a substantive due process case.

[9] The Magistrate Judge initially analyzed the substantive due process claim under the "improper motive" test of *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988), 488 U.S. 868 (1988). The District Court had the benefit of our intervening decision in *United Artists*, which made clear that "shocks the conscience" applies.

ethnic group. There is no virtual "taking" as in *Conroe*. And as we have previously observed,

> [E]very appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but "it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983."

United Artists, 316 F.3d at 402 (quoting *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982)).

The District Court applied the correct legal standard and did not abuse its discretion in dismissing the substantive due process claim.

B.

In the District Court, the Eichenlaubs also raised an equal protection challenge to what they claimed was selective or unequal enforcement of local development rules. Indeed, they argue here that other property owners have not been held to the same rigorous procedures that they claim were applied to the Eichenlaubs' parcels. They do not, however, assert that any differences in treatment stem from racial or other invidious forms of discrimination, or from an effort to burden fundamental rights (again, except for their First Amendment rights, which we treat above).

The Supreme Court has held that a " 'class of one' " can attack intentionally different treatment if it is " 'irrational and wholly arbitrary.' " *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 565 (2000) (internal citations omitted) (per curiam). The Magistrate Judge briefly addressed this issue in denying the motion for summary judgment on this claim, but the District Court reversed and granted summary judgment without discussion.

The "irrational and wholly arbitrary" standard is doubtless difficult for a plaintiff to meet in a zoning dispute, *id.* at 565-66 (Breyer, J., concurring), and we do not view an equal protection claim as a device to dilute the stringent requirements needed to show a substantive due process violation. It may be very unlikely that a claim that fails the substantive due process test will survive under an equal protection approach. Nevertheless, the District Court simply did not address the equal protection claim at all. Bearing in mind that we have remanded the retaliation claims for further consideration by the District Court, we will remand this somewhat overlapping claim as well so that the District Court may consider whether it is appropriate for summary judgment.

IV.

Finally, the Eichenlaubs appeal the District Court's decision to dismiss their request for a writ of mandamus to obtain a "deemed approval" of their proposed subdivision and development plans. In his Report and Recommendation of August 27, 2002, Magistrate Judge Caiazza recommended that the Eichenlaubs' request for a writ of mandamus be granted with respect to (1) the failure to inform the Eichenlaubs in writing of the Town Board's April 1999 vote denying the revised Fairview Gardens subdivision plan and (2) the Township's failure to timely review the Eichenlaubs' Saxonburg Boulevard grading permit and site plan applications.

However, the District Court determined that the Eichenlaubs' request for "deemed approval" of the Fairview Gardens and Saxonburg property plans was moot because the parties had executed two partial settlement agreements on February 12, 2003, and February 24, 2003. The Eichenlaubs allege here that this decision was improper because the partial settlement agreements left open the issue of payment of damages. The District Court never addressed whether damages were appropriate.

Mandamus will issue to compel a government agency's performance of a ministerial act when the plaintiff has a clear legal right to the remedy, the defendant has a duty, and there is no other equitable or appropriate remedy. *Malone v. W. Marlborough Township Bd. of Supervisors*, 131 Pa. Cmwlth. 347, 570 A.2d 147, 148-49 (1990). Under Commonwealth law, as the Township itself noted, "[d]amages recoverable in mandamus are those incidental to the specific relief being sought." *Stoner v. Township of Lower Merion*, 138 Pa. Cmwlth. 257, 587 A.2d 879, 885 (1991). "[A]ny damages available to the land owners as a result of the township's wrongful withholding of approval must be confined to those incidental to the specific relief available in mandamus." *Id.*

On appeal, we cannot determine whether summary judgment for damages incidental to mandamus was appropriate. Neither the Magistrate Court nor the District Court discussed the issue of damages sustained by the Eichenlaubs with respect to the delay in receiving the permits. In addition, neither the Eichenlaubs nor the Township has pointed to evidence in the record on which this Court could rely to sustain or reject a claim for monetary relief. We remand this issue to the District Court for a determination whether summary judgment is appropriate on the claim for damages incidental to mandamus.

We will affirm the District Court's order granting summary judgment to the Township of Indiana on the Eichenlaubs' substantive due process and David Eichenlaub's free speech and petition claim. With regard to David Eichenlaub's First Amendment retaliation claim and the Eichenlaubs' equal protection claim, we will vacate the District Court's judgment and remand for further proceedings. We will also remand the District Court's order denying the Eichenlaubs' application for a writ of mandamus for consideration of damages incurred, if any.

APPENDIX B

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

No. 05-2476 and 05-2498

David EICHENLAUB; Ike Construction; Daniel Eichenlaub; Barbara Eichenlaub,

v.

TOWNSHIP OF INDIANA; Township of Indiana Board of Supervisors; Dorothy T. Claus; George E. Dull, Jr.; Charles R. Federoff; Jeffrey D. Peck; Daniel L. Taylor, in their official capacities; Township of Indiana Code Enforcement Officer, Jeffrey S. Curti, in his official capacity; Dan Anderson, in his official capacity; Mildred Brozek, Administratix of the Estate of Kevin Brozek; Township of Indiana Engineer, Daniel B. Slagle, in his individual and official capacity (DC Civil No. 99-cv-01607)

Daniel Eichenlaub; Barbara Eichenlaub, his wife; David Eichenlaub,

v.

TOWNSHIP OF INDIANA; Township of Indiana Board of Supervisors; Dorothy T. Claus; George E. Dull, Jr.; Charles R. Federoff; Jeffrey D. Peck; Daniel L. Taylor, in their Individual and Official capacities; Township of Indiana Code Enforcement Officer, Jeffrey S. Curti, in his Individual and official capacity; Township of Indiana Manager, Kevin M. Brozek, in his Individual and Official Capacity; Township of Indiana Engineer, Daniel B. Slagle, in his Individual and Official Capacity (DC Civil No. 99-cv-01667)

Township of Indiana, Jeffrey D. Peck, in his individual capacity, Indiana Township Board of Supervisors and Jeffrey S. Curti, in his Official Capacity, Appellants in Docket No. 05-2476,

David Eichenlaub and Daniel and Barbara Eichenlaub, Appellants in Docket No. 05-2498.

Argued: October 24, 2006

Filed: Jan. 25, 2007

OPINION

Before SMITH, FISHER and COWEN, Circuit Judges.

Affirmed. Judge COWEN filed a dissenting opinion.

OPINION

SMITH, Circuit Judge.

The cross-appeals in these two consolidated cases represent yet another stage in litigation which has been before us previously. *See Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004). David, Daniel, and Barbara Eichenlaub claimed that the Township and various individuals, most notably a Township Supervisor, Jeffrey Peck, violated their constitutional rights in the course of dealing with the Eichenlaub's attempts to develop property they own in the Township. Eventually the case was narrowed down to: (1) David Eichenlaub's § 1983 claim that the Township and Peck, acting in his individual capacity, retaliated against him for exercising his First Amendment right to free speech; and (2) Daniel and Barbara Eichenlaub's state law mandamus claim. The case was tried before a jury, which rendered the verdict in favor of David Eichenlaub on the First Amendment claim and in favor of the Daniel and Barbara Eichenlaub on

the mandamus claim. The District Court subsequently awarded the Eichenlaubs' attorney fees.

Before us now are appeals of orders entered on April 8, 2005 and May 2, 2005, as well as various challenges to the sufficiency of the evidence. The parties' arguments lack merit. We will affirm the District Court's orders.

1. Facts and Procedural History

Barbara, Daniel, and David Eichenlaub ("the Eichenlaubs") own two tracts of property in Indiana Township. In 1984, Barbara and Daniel Eichenlaub purchased seven undeveloped lots within a 27-lot subdivision, approved in 1940, in the Fairview Elementary School District (the "Fairview Property"). Daniel and Barbara Eichenlaub also own a plot on Saxonburg Boulevard (the "Saxonburg Property"), which they use as office space, parking, and storage for Eichenlaub Landscaping, of which David is the principal.

In the mid-1990s, the Eichenlaubs began planning to develop the Fairview property into seven single family homes. The Eichenlaubs submitted a revised development plan in April 1999. The Township rejected the plan several times. The Township eventually approved a plan in June 1999, subject to the execution of a satisfactory developer's agreement. The Eichenlaubs withdrew this plan shortly thereafter, stating that the Township had proposed a developer's agreement that subjected them to "unnecessary and onerous obligations."

The Eichenlaubs claimed that the revised plan and developer's agreement were unnecessary and proceeded with development of the Fairview Property. Daniel and Barbara granted two of the Fairview lots to David and Carl Eichenlaub in August 1999. David then submitted an application for development of a single family home. The Township rejected this and a subsequent application, claiming that this was merely a plot to develop the homes serially and evade Township subdivision development restrictions. The Eichenlaubs continued to maintain that

further Township approval was unnecessary as they were proceeding in accordance with the original 1940 subdivision plan, and that later development codes therefore did not apply.

The Eichenlaubs filed for a grading permit for the Saxonburg Property in 1998, in order to develop a nursery for their landscaping firm. The Eichenlaubs filed a site plan for the project, which the Township approved in June 2000. However, the Township then refused to approve a Developer's Agreement because the Eichenlaubs did not pay the engineering fees for the project.

The Eichenlaubs filed two civil actions in the United States District Court for the Western District of Pennsylvania in September 1999. In the first action, David alleged that his First Amendment rights had been violated when he was silenced during a town meeting by Jeffrey Peck ("Peck"), a Township supervisor, removed from the meeting, and later subjected to retaliation from the Township for his comments. David also claimed that he and his business, Ike Construction, were defamed by the Township in a newspaper article in which the Township stated that the Eichenlaubs had violated a Township Ordinance.

In the second action, the Eichenlaubs raised claims under 42 U.S.C. § 1983, asserting violation of their rights to substantive due process and Equal Protection under the Fourteenth Amendment and arbitrary, selective, and retaliatory enforcement of Township regulations. The Eichenlaubs also sought a writ of mandamus to compel the Township to approve their projects. The two actions were consolidated.

In early 2003, the parties agreed to a partial settlement agreement while the action was pending in the District Court. This agreement granted the Eichenlaubs permits for both properties. In May of the same year, the District Court granted the Township summary judgment on all counts and dismissed the Eichenlaubs' petitions for mandamus as moot.

The Eichenlaubs appealed to this court on all counts. This court affirmed the summary judgment with respect to all claims except the claim for retaliation against protected speech, violation of Equal Protection due to selective and unequal enforcement, and the Eichenlaubs' claim for damages incidental to mandamus.

After remand to the District Court, the Township filed a motion for partial summary judgment, which the Court granted with respect to the Equal Protection claim. The District Court also excluded evidence relating to mandamus damages. The Eichenlaubs' claims of retaliation and for mandamus relief went to the jury. The jury rendered a verdict in favor of David on the retaliation claim against the Township and against Peck. The jury awarded David $77,935 in business compensatory damages and $50,000 in non-business compensatory damages. The jury allocated 60 percent of the non-business compensatory damages to Peck. The jury also found that the Eichenlaubs had properly submitted their grading permit for the Saxonburg Property in 1998.

Both parties filed post-verdict motions. In particular, the Eichenlaubs filed a motion for attorneys' fees and costs, seeking fees and costs totaling $682,079.55. The District Court awarded fees and costs of $633,302.70 and $39,117.69, respectively. The Court subsequently awarded an additional $9,346 in fees and $313.16 in costs. The Township filed a motion for judgment as a matter of law. The Court denied the Township's motion. These appeals followed.

2. Discussion

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We have carefully considered the many claims raised by both sides in these appeals. Apart from those claims discussed *infra*, which merit further discussion, we will

affirm the District Court for substantially the reasons stated in its final orders. We will also affirm the District Court's judgment as to its award of attorneys' fees, its refusal to instruct the jury on punitive damages, and its grant of summary judgment against the Eichenlaubs' Equal Protection claim.

A. The Award of Attorney's Fees

We review the District Court's award of fees under 42 U.S.C. § 1988 for abuse of discretion. *See Blum v. Witco Chem. Corp.*, 829 F.2d 367, 368 (3d Cir. 1987).

The Supreme Court laid out the framework for award of fees in a § 1983 action in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court began by emphasizing that, "the district court has discretion in determining the amount of a fee award," and this discretion is justified by the "district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* at 437. The *Hensley* Court endorsed the "lodestar calculation" method as the starting point, for which the District Court should first calculate the lodestar amount by multiplying an amount of hours the court deems reasonable by a reasonable hourly rate. *Id.* There is a strong presumption that the "lodestar" amount is reasonable. *Blum v. Stepson*, 465 U.S. 886, 888 (1984).

The Township argues that the District Court abused its discretion by concluding that the Eichenlaubs' unsuccessful claims were so closely related to their successful First Amendment and mandamus claims that no reduction in fees was warranted. The District Court found that although "many of Plaintiff's causes of actions [sic] were dismissed over time, the core factual complaint and related legal theory survived to trial, and were accepted by the jury in the favor of Plaintiff." The Court found that the dismissed substantive due process and Equal Protection claims were interwoven with the First Amendment claim and that because "the core factual issues remained for trial, despite the dismissal of

several causes of action, the time expended even on dismissed claims was not excessive, nor unrelated to the focus of this case." The District Court found that "[t]he work on the dismissed causes of action was useful and necessary to maintain this litigation," and that an award of the full lodestar amount was justified. The District Court noted that the parties agreed to a reduction of fees expended on the mandamus claim and on the state law defamation claim.

The Supreme Court noted that where a plaintiff presents "distinctly different claims for relief that are based on different facts and legal theories . . . work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Id.* at 434-35. However, the Supreme Court also stated that civil rights actions will often raise many claims arising from "a common core of facts" or "related legal theories," requiring the District Court to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. The Court expressly rejected a "mathematical" approach to fees, in which fee awards would be proportional to the number of successful claims. *Id.* This Court has also noted that fee awards may be reduced for time "spent litigating claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). The District Court correctly applied this jurisprudence to the case. The District Court appears to have accepted the Eichenlaubs' contention that the Township's actions towards both the Fairview and Saxonburg properties were motivated by animus against David Eichenlaub. The District Court accordingly concluded that the Eichenlaubs' claims were sufficiently interwoven to justify a full fee award.

The Township also argues that the disparity between the fee award and the total verdict indicates that the litigation resulted in only limited success that cannot support a full fee

award. In civil rights cases, however, the District Court may not reduce a fee award simply because it exceeds the damages award. *See Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1222 (3d Cir. 1995); *see also City of Riverside v. Rivera*, 477 U.S. 561, 571, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) (upholding a fee award of $245,456 where there were $33,350 in damages).

The Township argues that the District Court engaged in inappropriate burden shifting by forcing them to proffer evidence that the amount of time spent on the case was unreasonable or that the degree of success was unsatisfactory. This position misstates the relevant test. The prevailing party bears the burden of providing affidavits detailing hours spent, rates charged, and independent evidence that these rates match market rates. *See Blum*, 465 U.S. at 888. The District Court made numerous findings that, although this case was litigated to the hilt, it was conducted in a professional manner and that the fees and rates were reasonable. The District Court correctly observed that the burden is on the party seeking a special adjustment to the lodestar amount. *See Bell v. United Princeton Prop., Inc.*, 884 F.2d 713, 714 (3d Cir. 1989). This Court has expressly held that "the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." *Rode*, 892 F.2d at 1183. A decrease in a fee award may not be based on factors that have not been raised by the opposition. *Id.* If raised, however, the court may, in its discretion, reduce the fee award in light of the articulated objections. *Id.*

The hallmark of this Court's approach to interwoven claims and fee awards has been whether the claims were based on related legal theories arising from a common core of facts. *Rode*, 892 F.2d at 1183. David Eichenlaub's ultimately successful claim was based on the Township's alleged obstructionism in retarding development of the

Fairview and Saxonburg Properties, motivated by the desire to retaliate against David Eichenlaub for exercising his First Amendment right to petition the government.

The District Court correctly held that the Eichenlaubs' counsel was zealously representing their clients' interest and that all claims held a common core of operative facts. We defer to the District Court's exercise of its discretion due to the District Court's superior understanding of the litigation and of factual matters. The District Court correctly applied Supreme Court and Third Circuit precedent and has not abused its discretion, notwithstanding the disparity between the fee award and the compensatory damages.

B. The Lack of An Instruction to the Jury on Punitive Damages for David Eichenlaub's Retaliation Claim

The Supreme Court has held that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). We have held that this standard is disjunctive, and thus the defendant's conduct need only be reckless or callous. *See Springer v. Henry* 435 F.3d 268, 281 (3d Cir. 2006) (citing *Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989)). "We exercise plenary review over the district court's decision to deny [a] request to send the issue of punitive damages to the jury." *Delli Sani v. CNA Ins.*, 88 F.3d 192, 207 (3d Cir. 1996).

In *Brennan v. Norton*, 350 F.3d 399, 429-30 (3d Cir. 2003), the jury awarded punitive damages to the plaintiff on his First Amendment claim. However, we upheld the district court's judgment as a matter of law against the punitive damages. *Id.* We reasoned that:

> [T]he conspiratorial picture Brennan paints is not consistent with the record. He has produced no evidence that [the defendant] orchestrated a retaliatory campaign against him. . . . We do agree

> with Brennan's claim that this record supports a finding that Brennan's protected speech was a motivating factor in [the defendant's individual retaliatory actions]. However, the record does not support a finding that [the defendant] acted out of either recklessness or callousness. Indeed, a contrary conclusion would mean that any finding of retaliatory motive would automatically support punitive damages. Even accepting Brennan's formulation of the correct standard for punitive damages, it is clear under the Court's holding in *Smith v. Wade* that punitive damages require more than the retaliatory motive itself.

Id. We did not decide in Brennan what more a plaintiff in a First Amendment retaliation case would need to show besides a retaliatory motive in order to satisfy the *Smith* standard.

In *Springer*, however, we revisited this issue, holding there was sufficient evidence in that First Amendment retaliation case to support a jury's punitive damages award. *See Springer*, 435 F.3d at 281-83. We noted that the jury's verdict was supported both by strong circumstantial evidence, such as "unusual" procedures, and by substantiated evidence of the defendant's vindictive "attitude" towards the plaintiff. *Id.* at 281-82. We observed that the *Brennan* Court had been motivated by the "insufficient evidence for a punitive damages award." *Id.* at 282 (citing *Brennan*, 350 F.3d at 429). The *Brennan* Court was particularly troubled by Brennan's reliance on his "unsubstantiated allegations" that the Defendant had led a conspiracy to deprive Brennan of his protected rights. *Id.*

The District Court correctly assessed that the instant case is far more similar to *Brennan* than to *Springer*. We have no evidence in the record, other than the Eichenlaubs' unsubstantiated allegations, that Peck was engaged in a conspiracy to retaliate against David for his exercise of his

First Amendment rights. There is not sufficient evidence in the record to establish that Peck acted with the heightened culpability, above and beyond a retaliatory motive, to justify an instruction on punitive damages.

C. Summary Judgment on the Equal Protection Claims

We exercise plenary review over a grant or denial of summary judgment. *See Carter v. McGrady*, 292 F.3d 152, 157 (3d Cir. 2002).

A plaintiff bringing a class-of-one Equal Protection claim must show that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The District Court declined to decide whether there was a material issue as to whether these other properties were similarly situated. Rather, the District Court concluded that "[o]n the summary judgment record before the Court, plaintiffs have failed to meet their heavy burden of demonstrating that defendants had no rational justifications for any allegedly different treatment among similarly situated property owners." The District Court specifically addressed three of the properties, finding that "plaintiffs have not met their burden of demonstrating that the reasons offered by defendants for different treatment of allegedly similarly situated property owners were wholly arbitrary and not rationally related to legitimate local interests."

Olech and Eichenlaub instruct that the plaintiff has the burden of proof on the issue of whether there was a rational basis for the difference in treatment. *See Olech*, 528 U.S. at 564-65; *Eichenlaub*, 385 F.3d at 286-87. Our review of the record fails to reveal any genuine attempt by the Eichenlaubs to refute possible rational bases for distinguishing between the properties. Accordingly, we find that the District Court correctly granted summary judgment against the Equal Protection claim.

3. Conclusion

We will affirm in full the District Court's final orders entered on April 8, 2005 and May 2, 2005.

COWEN, Circuit Judge, dissenting.

I respectfully dissent with respect to the majority's affirmance of the award of attorney's fees, because the District Court did not consider the relationship between the amount of fees awarded and the limited success achieved. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court held that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced. . . . But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440. The *Hensley* Court cautioned that "[w]hen an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.* at 437.

David Eichenlaub, the only successful plaintiff in this case, prevailed on only one of numerous claims. The District Court's findings that "the tasks performed were necessary and the attorneys' fees and costs were reasonable for the effort expended" and that "the work on the dismissed claims was useful to the entire case" do not answer the question of whether the fee awarded was reasonable in light of the limited success achieved. In my view, a remand is appropriate so that the District Court may consider whether the amount of fees is reasonable in relation to the results obtained. *See id.* at 440 (vacating judgment and remanding so that the district court could determine whether the amount of fees was reasonable in relation to the results obtained). Indeed, in light of the limited success achieved, the fee award based on more than 3000 hours of claimed time may have been excessive. *See id.* at 436. ("[H]ad respondents

prevailed on only one of their six general claims, . . . a fee award based on the claimed [2,557] hours clearly would have been excessive.").

APPENDIX C

UNITED STATES DISTRICT COURT
W. D. OF PENNSYLVANIA

Action Nos. 99-cv-1607 (consolidated) and 99-cv-1667

DAVID EICHENLAUB and IKE CONSTRUCTION,

Plaintiffs,

and

DANIEL EICHENLAUB and BARBARA EICHENLAUB,

Consolidated Plaintiffs,

v.

TOWNSHIP OF INDIANA; TOWNSHIP OF INDIANA BOARD OF SUPERVISORS; DOROTHY T. CLAUS; GEORGE E. DULL, JR.; CHARLES R. FEDEROFF; JEFFREY D. PECK, and DANIEL L. TAYLOR, in their official capacities; TOWNSHIP OF INDIANA CODE ENFORCEMENT OFFICER, JEFFREY S. CURTI, in his official capacity; DAN ANDERSON; and MILDRED BROZEK, Administratrix of the Estate of Kevin Brozek,

Defendants,

and

TOWNSHIP OF INDIANA ENGINEER, DANIEL B. SLAGLE, in his individual and official capacity,

Consolidated Defendant.

May 29, 2003

MEMORANDUM OPINION

ARTHUR J. SCHWAB, District Judge.

These consolidated cases currently are before the Court on cross-motions for summary judgment. In deciding these motions the Court has considered the Record, the Report and Recommendation issued by Magistrate Judge Caiazza on August 27, 2002 (docket no. 87), the Objections to the Report and Recommendation, and supplemental filings of the parties filed in April of 2003 regarding the applicability of the *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003) decision.

This case involves multiple claims raised by members of the Eichenlaub family and by Ike Construction (owned by members of the Eichenlaub family) regarding their development of two separate pieces of property situated in Indiana Township, Pennsylvania: the Fairview Gardens property on which the Eichenlaubs proposed to build single family residences, and the Saxonburg Boulevard property on which the Eichenlaubs proposed to plant nursery stock to support their landscaping business.

David Eichenlaub assert claims at case 99-cv-1607 pursuant to 42 U.S.C. § 1983 based upon Defendants alleged violation of his First Amendment rights to petition government for redress of grievances when he was removed from a public meeting (Count I) and based upon various allegedly retaliatory acts undertaken by Defendants including arranging for other government agencies to inspect David Eichenlaub's Fairview Gardens work site (Count II). David Eichenlaub and Ike Construction also assert defamation claims regarding Defendants' involvement in a newspaper article recounting that David Eichenlaub was cited for violating an Indiana Township Ordinance (Count II).

At case number 99-cv-1667, David, Daniel and Barbara Eichenlaub raise a number of claims against Defendants.

They raise conspiracy claims under 42 U.S.C. § 1985 asserting: (1) a violation of their 14th Amendment rights to substantive due process (Count I) arising out of delays and disputes in securing authorization to develop the Fairview Gardens and Saxonburg Boulevard properties; and (2) denial of equal protection under the 14th Amendment based upon their compliance with Indiana Township ordinances in developing the properties at issue but still being denied the opportunity to proceed with the projects (Count II); and arbitrary action, selective enforcement and retaliation regarding both the Fairview Gardens and Saxonburg Boulevard properties (Count III). Finally, at Count IV of the Complaint, the Eichenlaubs' raise a claim seeking a writ of mandamus under Pennsylvania law seeking to compel the issuance of permits as they were "deemed approved" under the Pennsylvania Municipal Planning Code ("MPC"), 53 P.C.S.A. § 10101, due to Defendants' failure to meet various approval deadlines.

After reviewing the submissions of the parties and the Report and Recommendation, the Court adopts the Report and Recommendation dated August 27, 2003 (including the factual recitation at pp. 5-28 which are incorporated herein by reference) except as to the following claims, regarding which for the reasons set forth in this Memorandum Opinion the Court shall grant summary judgment as to items 1-3 and dismiss as to item 4 as moot:

1. Count I of the Complaint at 99-cv-1607 regarding Plaintiffs' claims that the Defendants retaliated against Plaintiffs due to their exercise of their First Amendment rights by causing government agencies to inspect the Plaintiffs' Fairview Gardens properties;
2. Count I of the Complaint at 99-cv-1667 regarding Plaintiffs' claims that their 14th Amendment substantive due process rights were violated by Defendants due to disputes and delays relating to the

development of the Fairview Gardens and Saxonburg Boulevard properties;

3. Count II of the Complaint at 99-cv-1667 regarding Plaintiffs' claims that they were denied equal protection of the laws when they complied with Indiana Township ordinances for the development of their properties but nevertheless were not permitted to go forward; and

4. Count IV of the Complaint at 99-cv-1667 regarding Plaintiffs' claims that they are entitled to a writ of mandamus pursuant to the MPC to compel the issuance of permits as "deemed approved".

I. SUMMARY JUDGMENT STANDARD

Summary judgment under Fed.R.Civ.P. 56(c) is appropriate " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d 129, 130 (3d Cir. 2001), *quoting Foehl v. United States*, 238 F.3d 474, 477 (3d Cir. 2001) (citations omitted). An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a summary judgment motion, the court must "view the evidence . . . through the prism of the substantive evidentiary burden" to determine "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not." *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242 (3d Cir. 2002), *quoting Liberty Lobby*, 477 U.S. at 254. When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to

support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). The non-moving party cannot rest on the pleadings, but instead must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial," Fed.R.Civ.P. 56(e), and cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. *Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (*citing Celotex*, 477 U.S. at 325 (1986)). The non-moving party must respond "by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial." *Simpson v. Kay Jewelers, Div. Of Sterling, Inc.*, 142 F. 3d 639, 643 n. 3 (3d Cir. 1998), *quoting Fuentes v. Perskie*, 32 F.3d 759, 762 n. 1 (3d Cir. 1994).

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF THE COMPLAINT AT 99-CV-1607 ASSERTING A FIRST AMENDMENT RETALIATION CLAIM SHALL BE GRANTED.

Plaintiff David Eichenlaub claims pursuant to section 1983 (42 U.S.C. § 1983) that his federal rights under the Petition Clause of the First Amendment of the United States Constitution were violated by Defendants' conduct as follows:

a. determining to exclude Mr. Eichenlaub from public meetings of the Board of Supervisors due to the content or anticipated content of his comments to the Board;

b. physically removing or causing or directing that Mr. Eichenlaub be physically removed from public meetings of the Board of Supervisors based upon the content or anticipated content of his comments to the Board;

c. adopting, implementing and continuing a policy or custom of the Township and the Board of Supervisors to prohibit or hinder Mr. Eichenlaub from speaking at public meetings of the Township Board of Supervisors based upon the content or anticipated content of his comments to the Board;

d. adopting, implementing and continuing a policy or custom of the Township and the Board of Supervisors to prohibit or hinder Mr. Eichenlaub from speaking in a recognized public forum on topics of public concern;

e. adopting, implementing and continuing a policy or custom of the Township and the Board of Supervisors to retaliate against Mr. Eichenlaub based upon the content or expected content of his comments to the Board; and

f. adopting, implementing and continuing a policy or custom of the Township and Board of Supervisors to retaliate against Mr. Eichenlaub based upon his exercise of his right of freedom of speech as guaranteed by the United States Constitution.

Doc. 42, Ex. A ¶ 45.

The Report and Recommendation recommended that summary judgment be granted with respect to the claim that David Eichenlaub's First Amendment rights were violated when he was removed from the Board meeting on September 14, 1999. The Report and Recommendation includes findings that Mr. Eichenlaub's speech during the Citizens Forum involved issues of private rather than public concern and that Defendant Peck had a content neutral reason for removing Mr. Eichenlaub from the meeting. Additionally,

the Report and Recommendation recommended that summary judgment issue in favor of Defendants regarding the official capacity claims as they merely stated a claim for another form of municipal liability. Report and Recommendation at pp. 29-40, 43-48). *See Kentucky v. Graham*, 473 U.S. 159, (1958) (suits under section 1983 against a municipal officer in his or her official capacity is in actuality a suit against the municipality that the officer represents and is treated as a suit against the entity itself). The Court agrees with these recommendations and adopts them in total. However, as to the retaliation component of David Eichenlaub's First Amendment claim, the Court finds that summary judgment should be granted in favor of Defendants rather than denied as stated in the Report and Recommendation. (*See* Report and Recommendation at pp. 41-43).[1]

To prevail on a First Amendment retaliation claim, David Eichenlaub must prove that: he engaged in a protected activity; (2) the government responded with retaliation; and (3) the protected activity was the cause of the government's retaliation. *Grimm v. Borough of Norristown*, 226 F. Supp.2d 606, 636 (E.D.Pa. 2002), *citing Anderson v. Davila*, 125 F.3d 148, 160-61 (3d Cir. 1997), *citing Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). As to the first element, whether an activity receives First Amendment protection is a question of law. *Id.* A plaintiff must show that speech is a matter of

---

[1] The Court notes that the Report and Recommendation denied summary judgment citing *Sameric Corp. of Delaware Inc. v. City of Philadelphia*, 142 F.3d 582, 594 n. 10 (3d Cir. 1998) in support of the finding that a fact finder must examine the circumstances that motivated the Board's decisions regarding Plaintiffs. However, the Court finds *Sameric* inapposite as it was a case applying the law of substantive due process not First Amendment violations under § 1983.

public concern in order to receive First Amendment protection. *Id.*

Plaintiffs claim that Defendants engaged in retaliatory conduct because of the comments that David Eichenlaub made during the Citizens Forum. Plaintiffs allege several distinct incidents in support of this claim. These include the incidents set forth at pages 25-27 of the Report and Recommendation, summarized as follows:

1. Defendant Peck retaliated against David Eichenlaub by stating to Mr. Biery (per the Affidavit of Wesley Biery offered in opposition to summary judgment) that David Eichenlaub is litigious and advised him not to associate with David Eichenlaub;
2. Defendant Peck retaliated against David Eichenlaub per the deposition testimony of Dorothy Claus by characterizing David Eichenlaub as a "radical" individual;
3. The decision of the Board of Supervisors during an executive session not to sign forms required by utility companies before they would commence service at Plaintiffs property; and
4. The sending of a letter by Township employee Jacquelyn Sippel to the Allegheny County Assessment Office resulting in a ten-fold increase in Plaintiff's tax assessment; Ms. Sippel resided with Defendant Brozek but denied speaking to him about this issue.

Report and Recommendation at pp. 25-27.

Significantly, the Report and Recommendation made a specific finding with which the Court agrees that as a matter of law, David Eichenlaub's speech during the Citizens Forum does not debate public issues and therefore is not a matter of public concern. Report and Recommendation at p. 37. David Eichenlaub's claim does not meet the threshold requirement entitling his conduct during the Citizens Forum to First Amendment protection. Consequently, the Court

need not consider the second and third prong of the retaliation claim as to whether the government responded with retaliation and the protected activity was the cause of the government's retaliation. Therefore, summary judgment shall be entered in favor of the Defendants as to the entirety of Count I of the Complaint at 99-cv-1607, including the retaliation component of his First Amendment claim.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNTS I AND II OF THE AMENDED COMPLAINT AT 99-CV-1667 SHALL BE GRANTED DUE TO RECENT CASE LAW THAT OVERRULES THE CASES RELIED UPON IN DENYING THE MOTIONS WITHIN THE REPORT AND RECOMMENDATION

The Plaintiffs' Fourteenth (14th) Amendment claims are now ripe for Defendants' motion for summary judgment due to the recent decision of the United States Court of Appeals for the Third Circuit in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). *United Artists* determined the standard to be applied in determining whether municipal officers can be held liable under 42 U.S.C. § 1983 for their decisions and actions regarding land use and development that allegedly are violative of the 14th Amendment – at Count I violating substantive due process due to disputes and delays in securing authorizations to proceed and at Count II violating Equal Protection by not permitting development to proceed despite compliance with Township Ordinances. The Court held that the appropriate standard is whether the conduct engaged in by the municipal officials was so egregious as to "*shock the conscience*," thereby expressly overruling precedent stemming from *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), which applied the much less demanding "*improper motive*" standard. *United Artists*, 316 F.3d at 400-01. The Report and Recommendation relied upon *Bello* and its progeny in denying Defendants' Motion for Summary

Judgment as to the substantive due process claim. Consequently, after reviewing the record in light of the applicable standard of "*shocks the conscience*" standard, summary judgment will be entered in favor of Defendants on this claim.

In *United Artists*, the Court of Appeals recognized that *Bello* and its progeny were superceded by the holding of the Supreme Court of the United States in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), where the Supreme Court announced the standard applicable when a plaintiff alleges that an action taken by an executive branch official violated substantive due process. *United Artists*, 316 F.3d at 399. In *Lewis*, the Supreme Court recognized that executive conduct can be said to violate substantive due process only when it can properly be characterized as arbitrary, or conscience shocking in a constitutional sense. *Lewis*, 523 U.S. at 847. However, the meaning of the standard "*shock the conscience*" varies depending upon the factual context and it encompasses only the most egregious conduct. *United Artists*, 316 F.3d at 399-400.

The conduct alleged by the Eichenlaubs, while arguably (as reflected in the Report and Recommendation) a question of fact for the fact finder under the lesser "improper motive" standard, simply cannot be characterized as "the most egregious official conduct" to withstand summary judgment under the higher "shocks the conscience" standard as no reasonable jury could return a verdict for Plaintiffs based on his standard. *United Artists*, 316 F. 3d at 400, *citing Lewis*, 523 U.S. at 846. That standard requires that the government officials' conduct be so egregious, and so outrageous, that it may fairly be said to shock the contemporary conscience. *Lewis*, 523 U.S. at 847. The conduct alleged here simply does not rise to this level. For example, at pages 3-8 of Plaintiffs' Supplemental Brief In Response to Defendants' Motion for Summary Judgment, Plaintiffs allege *inter alia*

the following conduct in support of their substantive due process claim:

- Defendant Curti conducted multiple unannounced inspections of the Fairview Gardens property and issued citations for alleged violations of the Township's grading ordinance;
- Defendant Peck telephoned David Eichenlaub and made "*some suggestions*", including one that Mr.. Eichenlaub not return to speak at Township meetings about concerns he had previously conveyed. (Italics Added); and
- Defendant Peck directed David Eichenlaub's removal from a Township meeting after Mr. Eichenlaub directed questions to Mr. Peck and Mr. Peck asked Mr. Eichenlaub whether he had any additional matters to bring to the attention of the Board. Mr. Eichenlaub ultimately was removed from the meeting at Mr. Peck's direction.

Plaintiffs' Supplemental Brief In Response to Defendants' Motion for Summary Judgment at pp. 3-8.

The alleged conduct, however, does not approach the level necessary to "shock the conscience" in the contemporary constitutional sense. Finding that the unannounced inspections rose to the level of "shock the conscience" would transforms land-use decisions into matters of constitutional proportion by casting the court in the role of a zoning board of appeals. *See United Artists* 316 F.3d at 402. This is not the role of the Court. Likewise mere "*suggestions*" such as those allegedly made by Defendant Peck during his telephone conversation with David Eichenlaub do not meet this standard. Lastly, while David Eichenlaub's removal from the Township meeting may have caused embarrassment, it simply does not shock the conscience given the fact that David Eichenlaub was permitted to speak and participate in the process. *See* Report and Recommendation summarizing

colloquy between Peck and David Eichenlaub at pp. 13-23 and the record citations therein.

As reiterated in *United Artists*:

> [E]very appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but 'it is not enough simply to give these state law claims constitutional labels such as due process or equal protection in order to raise a substantial federal questions under section 1983.

United Artists, 316 F.3d at 402, *citing Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833. Consequently, the Defendants' Motion for Summary Judgment as to Counts I and II of the Complaint at 99-cv-1667 is granted.

IV. COUNT IV OF PLAINTIFFS' AMENDED COMPLAINT AT 99-CV-1667 SEEKING A WRIT OF MANDAMUS IS MOOT AS A RESULT OF THE PARTIAL SETTLEMENT

At Count IV of the Amended Complaint at 99-cv-1667, Plaintiffs seek a writ of mandamus to obtain a "deemed approval" of the Plaintiffs' proposed subdivision plan for the Fairview Gardens property and of Plaintiffs' development plans for the Saxonburg property based upon the Defendants' violation of the Pennsylvania Municipal Planning Code ("MPC") (53 P.S. § 10101 *et. seq.*) in the timing and content of their denial of Plaintiffs' proposed plans. Section 508(1), (53 P.S. § 10508(1)), of the MPC mandates that a written decision on a plan application be generated not later than fifteen (15) days following the Board of Supervisors' action. In addition, section 508(2), (53 P.S. § 10508(2)), requires that when a plan is not approved in the form applied, the decision must specify the defects found in the application and

describe the requirements which have not been met with citations to the statute or ordinance relied upon.

Section 508 of the MPC is designed to remedy the losses caused by the indecision, vague recommendations, and protracted deliberations of local governing bodies and to eliminate deliberate or negligent inaction on the part of governing officials. *Penllyn Lands v. Board of Supervisors of Lower Gwynedd Township*, 638 A.3d 332, 334 (Pa. Commw. 1994). The Court, however, need not reach the issue of whether mandamus must issue as it is moot given the Partial Settlement Agreements executed by the parties on February 12, 2003 and February 24, 2003 relating to the building permits for the Fairview Gardens property and the Saxonburg property respectively, which were the crux of Plaintiffs' mandamus petition. Therefore, the Court dismisses Count IV of Plaintiffs' Amended Complaint at 99-cv-1667 as moot.

V. CONCLUSION

For the reasons set forth herein and in the adopted portions of the Report and Recommendation, the Court shall enter an Order dated this same date granting summary judgment as to all counts of the Complaints at 99-cv-1607 and 99-cv-1667 except as to Count IV of 99-cv-1667 which is dismissed as moot in light of the terms of the parties' Partial Settlement Agreements.[2]

---

[2] Further, the Court will not exercise its discretion, under 42 U.S.C. § 1988(b), to award reasonable attorney's fees to plaintiffs since plaintiffs are not the prevailing party for the reasons set forth above, and even if plaintiffs were arguably the prevailing party under the terms of the Partial Settlement Agreements, the Court declines to award attorney's fees to plaintiff.

APPENDIX D

UNITED STATES DISTRICT COURT
W. D. OF PENNSYLVANIA

Civil Action Nos. 99-1607 and 99-1667
Re: Docs. No. 34, 66, 67 and 69

DAVID EICHENLAUB and IKE CONSTRUCTION,

Plaintiff,

v.

TOWNSHIP OF INDIANA et al.,

Defendants.

DANIEL EICHENLAUB, AND BARBARA EICHENLAUB, his wife, and DAVID EICHENLAUB,

Plaintiffs,

v.

TOWNSHIP OF INDIANA, et al.

Defendants.

Aug. 27, 2002

MAGISTRATE JUDGES REPORT AND RECOMMENDATIONS

CAIAZZA, Chief U.S. Magistrate Judge.

I. RECOMMENDATION

The following recommendations apply to the Motion for Partial Summary Judgment filed by the plaintiffs at document number thirty-four regarding the Amended Complaint filed in civil action 99-1667. The District Court should:

1. Deny the plaintiffs' motion with respect to the substantive due process claim;
2. Grant the plaintiffs' request for a writ of mandamus under the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. section 10101 *et seq.*, with respect to: (a) the defendants' failure to notify the plaintiffs of the April 27, 1999, decision to deny the revised subdivision plan for Fairview Gardens; and (b) the defendants' failure to act on the plaintiffs' grading permit and site plan applications for the Saxonburg Boulevard property; and
3. Deny the plaintiffs' request for a writ of mandamus under the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. section 10101 *et seq.*, because of the plaintiffs' failure to specify on June 23, 1999, which contingencies of the Township engineer's recommendation were factored into the approval of the Fairview Gardens subdivision plan.

The following recommendations apply to the defendants' Motions for Summary Judgment filed at documents sixty-six and sixty-seven regarding the Amended Complaint filed in Civil Action 99-1607. The District Court should:

1. Grant the motions with respect to the claim that the defendants violated David Eichenlaub's rights secured by the petition clause of the First Amendment;
2. Deny the motions with respect to the retaliation claim alleged under the First Amendment;
3. Deny the motions with respect to municipal liability under 42 U.S.C. § 1983;

4. Grant the motions with respect to the official capacity claims alleged against the individual defendants under 42 U.S.C. § 1983;
5. Deny the motions with respect to the personal capacity claim alleged against defendant Jeffrey D. Peck under 42 U.S.C. § 1983;
6. Deny defendant Jeffrey D. Peck's request for qualified immunity; and
7. Grant the motions with respect to the defamation claim alleged under 42 Pa. Con. Stat. Ann. section 8343(a).

The following recommendations apply to the defendants' Motions for Summary Judgment filed at documents sixty-six and sixty-nine regarding the Amended Complaint filed in Civil Action 99-1667. The District Court should:

1. Deny the motions with respect to the substantive due process and equal protection claims;
2. Deny the defendants' request for qualified immunity;
3. Grant the motions with respect to the conspiracy claim alleged under 42 U.S.C. § 1985(3);
4. Deny the motions with respect to the plaintiffs' request for a writ of mandamus under the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. section 10101 *et seq.*, because of the defendants' failure to notify the plaintiffs of the April 27, 1999, decision that denied the revised subdivision plan for Fairview Gardens and the defendants' failure to act on the plaintiffs' grading permit and site plan applications for the Saxonburg Boulevard property; and
5. Grant the motions with respect to the plaintiffs' request for a writ of mandamus under the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. section 10101 *et seq.*, because of the defendants' failure to specify on June 23, 1999, which contingencies of the Township engineer's

recommendation were factored into the approval of the Fairview Gardens subdivision plan.

II. REPORT

Currently before the court are the Motions for Summary Judgment filed as documents sixty-six, sixty-seven and sixty-nine which are currently pending on the docket of the United States District Court for the Western District of Pennsylvania. The court's present consideration also discovered an unresolved Motion for Partial Summary Judgment filed by the plaintiffs at document thirty-three that is not pending on the docket. Because the issues set out in the Motion for Partial Summary Judgment duplicate those raised in the instant Motions for Summary Judgment, the court will consider its merits in order to resolve all outstanding matters and to prepare this lawsuit for trial. Additionally, the court will clarify the somewhat convoluted procedural history of this consolidated lawsuit before stating the relevant facts that form the basis of the plaintiffs' civil rights claims.

A. Procedural History

In September 1999, the Plaintiffs initiated civil actions 99-1607 and 99-1667. Both lawsuits were derived from the same factual scenario and were filed under 42 U.S.C. § 1983. After discovery closed and the defendants filed their respective Motions for Summary Judgment, the plaintiffs filed a Motion to Consolidate and a Motion to Amend the Complaint in civil action 99-1607. *See* Docs. 42 and 43. The proposed amendment sought to add Ike Construction as a plaintiff to the defamation claim alleged in Count II. *See* Doc. 42 Ex. A.

This court granted the plaintiffs' Motion to Consolidate on July 27, 2001, but denied the Motion to Amend Complaint on July 31, 2001. *See* Docs. 45 and 50. David Eichenlaub appealed to United States District Court Judge Donald J. Lee, and on August 30, 2001, Judge Lee reversed the Magistrate Judge's decision and granted the plaintiffs' Motion to Amend Complaint in civil action 99-1607. *See* Doc. 58. The

defendants filed their Motions for Summary Judgment with respect to the Amended Complaint in civil action 99-1607 on February 2, 2002. *See* Docs. 66, 67 and 69. Thereafter, on April 4, 2002, the plaintiffs motioned to amend the original Complaint in civil action 99-1667 and on April 22, 2002, the court granted the motion. Doc. 77.[1]

B. Consolidated Facts

1. The Parties

David Eichenlaub resides in Indiana Township, Allegheny County, Pennsylvania. Doc. 42 Ex. A ¶ 4. Barbara and Daniel Eichenlaub are residents of Fox Chapel, Pennsylvania and own property in Indiana Township. Doc. 77 at ¶¶ 3 and 4. Ike Construction is incorporated in the Commonwealth of Pennsylvania and its principle place of business is in Indianola, Pennsylvania. Doc. 42 Ex. A ¶ 5.

Indiana Township (Township) is a government body formed under Pennsylvania law that acts through a Board of Supervisors (Board), a Township Manager (Manager) and a Township Code Enforcement Officer (Enforcement Officer). Doc. 42 Ex. A ¶ 6 and 7.

The individual defendants held positions within the Township's administration during the relevant period of time. Jeffrey D. Peck (Peck) was the Chairman of the Board of Supervisors, and, under Township Ordinance 210.06, acted

---

[1] Although the court consolidated the plaintiffs' lawsuits and designated 99-1607 as the lead case number, the parties' summary judgment motions bifurcate the Amended Complaints and argue their merits separately. *See* Docs. 66, 67, 69, 75 and 76.

Additionally, the Clerk of Courts entered the Amended Complaint in civil action 99-1667 onto the docket. However, the Amended Complaint in civil action 99-1607, which was attached to the Motion to Amend Complaint, does not have a separate docket entry. Nevertheless, the defendants filed Answers and Affirmative Defenses to the Amended Complaint in 99-1607. *See* Docs. 64 and 65.

as the Mayor for the purpose of presiding over the Board's public meetings. *See* Doc. 35 at 4 and Doc. 68 at 2. The Amended Complaints filed in cases 99-1607 and 99-1667 named Peck as a defendant in his official and individual capacities. Doc. 42 ¶ 16; Doc. 77 ¶ 10. Defendants Dorothy L. Claus (Claus), George E. Dull, Jr. (Dull), Charles R. Federoff (Federoff) and Daniel L. Taylor (Taylor) were members of the Board. Doc. 42 ¶¶ 9-12. The Amended Complaint in 99-1607 names each Board member as a defendant in their official capacities. *Id.* ¶ 15. However, the Amended Complaint in 99-1667 states official and individual capacity claims against the Board members. Doc. 77 ¶¶ 7, 8, 9 and 11. During the relevant period of time, Jeffrey S. Curti (Curti) was the Township's Code Enforcement Officer and Kevin M. Brozek (Brozek) was the Township's Manager. Doc. 42 ¶¶ 13 and 14.[2] The Amended Complaint in 99-1607 names Curti and Brozek as defendants in their official capacities and the Amended Complaint in 99-1667 names them as defendants in their official and individual capacities. Doc. 42 ¶ 15; Doc. 77 at ¶¶ 12 and 14. Daniel B. Slagle (Slagle) was the Township's engineer and the Amended Complaint in civil action 99-1667 names him as a defendant in his official and individual capacities. Doc. 77 ¶ 13.

2. Disputed Properties

David, Daniel and Barbara Eichenlaub (the Eichenlaubs) own property in the Fairview Gardens Plan of Indiana Township. Doc. 77 ¶¶ 19 and 20. Daniel and Barbara Eichenlaub also own property located along Saxonburg Boulevard in Indiana Township. *Id.* ¶ 70. Disputes with the defendants related to the use and development of these properties are the basis of the plaintiffs' civil rights claims alleged under 42 U.S.C. § 1983.

---

[2] On August 2, 2002, defense counsel informed the court via telephone of Brozek's death.

a. Fairview Gardens

On December 14, 1940, the Allegheny County Planning Commission and the Board of Supervisors of Indiana Township approved the subdivision of the tract of property which became the Fairview Gardens Plan. Doc. 34 at 3. The son of the original developer conveyed several lots to the Eichenlaubs in 1984. *Id.*

During the mid-1990's, David Eichenlaub began to grade portions of the plaintiffs' lots in the Fairview Gardens Plan. *Id.* at 5. Curti advised David Eichenlaub in 1997 that he needed a permit to continue grading the property. *Id.* In response, David Eichenlaub informed Curti that he did not believe that a permit was required because Section 4(3) of the Township Grading Ordinance exempted "grading for the construction of a new single family or two family structure which is located on a lot within a plat which has received final approval in accordance with the Township Subdivision Ordinances." *Id.* at 6.

The Eichenlaubs proceeded to develop their property in Fairview Gardens, and, on April 5, 1999, they submitted a subdivision plan to the Township. *Id.* at 7. Under the Township's Subdivision and Land Use Ordinance, the Planning Commission initially reviews subdivision proposals and recommends their approval or denial to the Board. *Id.* at 8. Slagle notified the Eichenlaubs by a letter dated April 14, 1999, that the Planning Commission denied their plan because it contained several deficiencies, including the lack of a sewer utility easement. *Id.* at 8 and 21.

The plaintiffs subsequently submitted a revised subdivision plan to the Township. On April 20, 1999, the Planning Commission discussed the deficiencies cited in Slagle's April 14, 1999 letter and David Eichenlaub's corresponding objections and formally voted to deny the plaintiffs' revised plan. *Id.* at 8. Curti informed the Board of the Planning Commission's decision on April 21, 1999, and at the Board's meeting on April 27, 1999, Slagle presented the Eichenlaubs'

revised plan during his report as the Township's engineer. *Id.* at 9. After Slagle completed his discussion, the Board voted to deny the revised subdivision plan. *Id.* The plaintiffs contend that the subdivision plan was not placed on the Board's published agenda for the meeting and that the Board did not provide either notification of or an explanation for their actions. *Id.*

The plaintiffs submitted a second revised plan in May 1999. *Id.* at 10. The Planning Commission reviewed the second plan on May 18, 1999, and did not recommend its approval. *Id.* The Board subsequently adopted the Planning Commission's recommendation on May 18, 1999, and on May 26, 1999, Brozek notified Daniel and Barbara Eichenlaub of the Board's decision. *Id.* at 11.

In June 1999, the Eichenlaubs submitted a third revised plan, and on June 15, 1999, the Planning Commission recommended its approval. *Id.* The Board also approved the subdivision plan on June 22, 1999, and the next day, Brozek sent Daniel and Barbara Eichenlaub a letter to inform them of the Board's decision. *Id.* His letter advised that pursuant to the engineer's report, the Township would not issue building permits until it received approval from the Allegheny County Conservation District. *Id.*

However, on August 3, 1999, Daniel and Barbara Eichenlaub's attorney informed the Township of their decision to withdraw the subdivision plan. *Id.* at 13. His letter stated:

> After a review of the Township of Indiana ordinances and the Fairview Garden Plan of Lots, it is our opinion that Barbara and Daniel Eichenlaub have been asked to undertake measures in connection with the Fairview Gardens Plan that are completely unnecessary. This has resulted in needless delays. Significant expense has been incurred which we believe to be unnecessary and which we believe to be the result of the inconsistent

> interpretation and application of the Township's ordinances. This has resulted in treatment of the Eichenlaubs in a manner disparate from that of other owners who seek to build upon their land.

Civ. A. 99-1667, Doc. 35 Ex. A.

On August 26, 1999, David Eichenlaub applied for a permit to build a single family residence on Lot Number Seven in the Fairview Gardens Plan. Doc. 34 at 13. On September 9, 1999, Curti notified David Eichenlaub that his application had been denied because: (1) "the Fairview Gardens Plan of Lots was laid out many years ago, [and] the undeveloped portion of said Plan must now meet current Township requirements"; and (2) Lot Number Seven is not subdivided properly. *Id.*

While the plaintiffs sought approval for their subdivision plan, they resumed grading their property in Fairview Gardens, and allege that Curti and Slagle subjected their operations to unwarranted permit restrictions. Doc. 75 at 8 and 9. Curti conducted several unannounced visits and cited the Eichenlaubs on July 30, 1999 and August 16, 1999, for violations of the Township's grading ordinance. *Id.* at 11. Curti also reported the alleged grading violations to the Allegheny County Conservation District which issued compliance notices and earth disturbance inspection reports to Daniel Eichenlaub. *Id.* The plaintiffs appealed the citations to the Allegheny County Court of Common Pleas on the basis that their property was exempt from permit requirements of the Township's grading ordinance because it was a pre-existing single family lot. On February 22, 2000, the late Judge Robert Dauer ultimately resolved the grading dispute in favor of the plaintiffs and determined that they had not violated the applicable ordinance. *Id.*

On August 3, 2000, David Eichenlaub applied for a new building permit for Lot Number Seven in Fairview Gardens and supported his request by citing to Judge Dauer's decision in the grading dispute. Doc. 34 at 14. Curti denied

Eichenlaub's request on August 8, 2000, and supported his decision by referencing the identical reasons that he relied upon to reject the first building permit application in September 1999.

b. Saxonburg Boulevard

In 1998, the plaintiffs decided to grade a separate tract of property located on Saxonburg Boulevard to plant nursery stock for their landscaping business. Doc. 76 at 5. They filed a grading permit application in August 1998 and over one year later, Slagle advised David Eichenlaub in October 1999 that the project required a site plan because of the project's large scale. Doc. 70 at 3; Doc. 76 at 6. The plaintiffs' subsequent site plan, which was submitted to the Township on November 7, 1999, received the approval of the Board on June 13, 2000. *Id.* David and Daniel Eichenlaub met with Brozek on October 23, 2000, to review the Developer's Agreement and the engineering fees assessed by the Township. *Id.* Prior to this meeting, David Eichenlaub sent several letters to the Township which objected to the Township's engineering fees. Doc. 76 at 7. These charges, as of October 2000, totaled $297.00 plus interest. Doc. 70 at 4. To date, the Township has not executed the Developer's Agreement because the plaintiffs have refused to pay the engineering fees. Doc. 70 at 3 and 4; Doc. 76 at 7 and 8.

3. Citizens Forum

David Eichenlaub attended the Board's public meetings and he continually claimed that his family had been targeted for selective enforcement of the Township's ordinances. Doc. 75 at 9. According to the present record, he first voiced this opinion on August 24, 1999, during the Citizen's Forum. *Id.* Peck allegedly telephoned Eichenlaub the following day and suggested that he refrain from attending the Board's future public meetings. *Id.*; Doc. 34 at 3. Eichenlaub did not heed Peck's suggestion and appeared at the next public meeting on September 14, 1999. He again addressed the Board during the Citizen's Forum and questioned the

Township's bond requirements for grading permits, its enforcement of local ordinances and its policies with respect to correspondence addressed to the Board. Doc. 68 at 7. The following excerpts taken from the meeting's transcript evidence a lengthy discussion between Eichenlaub and Peck and their disagreement regarding the administration of Township affairs and the purpose of the Citizen's Forum. Doc. 68 at 9 and 10.

Peck: Next on the agenda is our Citizens Forum. There is nobody listed as wanting to be on the Citizens Forum. Is there anybody in the audience who would like to address the Board of Supervisors?

Eichenlaub: I would like to. David Eichenlaub for the record. And I would like to thank you Mr. Mayor for being called here after last month's meeting for two reasons, you were handling with concerns with the parking along Saxon Boulevard and in our discussion you also shared some other new concerns with me about what goes on and the fact that you don't get to read all of your correspondence and I guess, ah, at the last meeting before executive session before the meeting [sic] I guess the manager brought you up to speed about what was going on with us and the Township, me and my brother Dan, and uh, I guess on that note I was thinking maybe we should change the format the way it should be [sic] at the Public Township meeting which is to list all of the correspondence, and have it read or have it accurately paraphrase, and then have an additional comment session [*inaudible*] after the fact that the correspondence has been read.

* * *

Peck: Well, we don't get all of the correspondence that comes into the Township.

Eichenlaub: Well, that is how it is suppose to be run.

Peck: No, it's not.

Eichenlaub: Yes, it is.

Peck: Look David, let me explain to you how it is run and you may not agree . . . .

Eichenlaub: Why don't we ask the solicitor he is more up to speed on this than you or I.

Peck: Dave, let me . . . .

Eichenlaub: Mr. Snyder . . . should we read all of the correspondence . . .

Peck: Dave, I'm gonna run the meeting. Ok.

Eichenlaub: I thought this was the Citizens Forum . . . and I had an opportunity to talk and ask questions.

Peck: It is and you do and I'm gonna address the last comment you made. It is impossible for us to review every piece of correspondence that comes into this Township and when I'm done you can respond to what I'm saying to you. We hire the Manager and he gets all of the correspondence that comes in. You said the last time you were in front of the Board that all of the letters that you had addressed to the Township were addressed to the Supervisors.

* * *

Peck: I have never had anybody, since I have been on the Board, complain that any of their correspondence was not addressed by the Township Manager or that anything was ignored. So if you're telling me that some correspondence has not been addressed or some correspondence has been ignored then you need to specifically address that.

Eichenlaub: Then I will. I guess as we go on that day when you started speaking on behalf of the whole Board that a phone conversation between he and I, I thought that was not the appropriate place to discuss any of our business. And, I doubt Dorothy that you would give Mr. Peck the authority to speak on your behalf or how about you Mr. Taylor, is he allowed to talk on your behalf?

* * *

Eichenlaub: I find that to be rather strange and I ended my conversations with Mr. Peck right then because I didn't think that was right. I guess one of the other points about last month's meeting was the fact that we were gonna address the deficiencies in some of the grading permits in the Township and try to start enforcing the rules evenly for everybody. And, I guess we had some concerns last month with the fact that the bond wasn't right and the board agreed that it probably was not the right bond and that they were gonna have another one in place. Now with my visit here today the Zoning Officer was still unable to give me the appropriate bond and I was wondering if someone else had a copy of the appropriate bond and I was wondering if someone else had a copy of the appropriate bond or – that was 260 West Chapel Ridge Road? Is that what this was for? Lot No. 51 Hartwood Estate. Has that been addressed or is that still, we don't have a bond in place or that.

Peck: We have a bond in place and we explained that to you last time David.

* * *

Peck: Do you have any other issues you would like to bring up? We're not going to address that.

Eichenlaub: I've got lots of them Mr. Peck. The other thing in my visit today you know I brought copies of the old stuff and some new letters and so on that were sent to us today and you know along with this grading permit, it's interesting how it was blank at the last meeting and now it's back dated a couple days before the prior meeting in the fact that now all of the sudden we found a permit number which didn't have before. I find that all to be rather interesting how that all worked. But on my correspondence today from the Township and on several pieces of all kinds of stuff put in the mail today is what the Zoning Officer told me and it's dated Sept. 8 and Sept. 3 and is this standard practice for the Township to back date letters and send them out to me?

Peck: We're not backdating letters, have you ever written a letter and not mailed it the same day?

* * *

Eichenlaub: I don't find this to be right. When does any body get off taking a letter eight days to get out in the mail. This is kinda bizarre to me. And then we still aren't gonna address the grading permit issues. So, you know, here we are and some people back to the same thing, Mr. Peck, some people are gonna apply to the ordinances and other ones won't. I applied for a building permit here and both the Zoning Officer sent me a letter which is um, let me see I think his is a five page one here and I would like to know anybody that builds a house on a lot in this township that adheres to all these specifications and/or we have another

letter here from Mr. Snyder that outlines all of the same stuff here so by virtue of the township's own letters, I mean what's going on here? Some people that have grading permits and some people have to have all this stuff and other ones don't? I mean . . . .

* * *

Eichenlaub: Have you not read any of my correspondence to you Mr. Peck?

Peck: Don't interrupt.

Eichenlaub: That outlines some of my uh concerns about how the Township is being run and how things are being done, and the fact that you are not evenly enforcing all ordinances.

* * *

Peck: (gaveling) (sic) – please don't interrupt me.

Eichenlaub: You weren't talking, I was.

Peck: I was talking.

Eichenlaub: And I will continue to talk, this is the Citizens Forum . . . and

Peck: No you won't. You are not running this meeting. Please let me talk.

Eichenlaub: I asked you a question and you didn't answer it so I . . .

Peck: Mr. Eichenlaub, if you continue to disrupt this meeting I will have a police officer remove you from the meeting.

Eichenlaub: Well, go right ahead and the fact is that this is the Citizen's Forum, I want to know if you gonna [sic] do anything about the selective enforcement of the ordinances of this Township?

Peck: This is the Citizen's Forum but this is . . . this is, Mr. Eichenlaub . . . this is a meeting run by the Township Supervisors not by you and if you don't come to order I gonna [sic] have you removed from the meeting.

Eichenlaub: Yeah, if you don't like people talking in the Citizen's Forum Mr. Peck, we can always . . .

Peck: I let you talk.

Eichenlaub: . . . have you removed from office and it could very easily be done.

* * *

Eichenlaub: I asked a question and you haven't answered it yet. Now are you gonna answer it ever?

Peck: Have you given me time to answer it?

Eichenlaub: Go right ahead.

Peck: Mr. Eichenlaub we are not gonna address your grading permit denial at this meeting. If you have a problem with that you address it in writing to Mr. Brozek and you will get a written reply on why your grading permit was denied.

Eichenlaub: I have no denial letter for a grading permit . . .

(Gaveling) (sic)

Peck: I'm not done yet, I'm not done yet. We are not going to use the Citizens Forum as means [sic] for you to debate your disagreements with the Township. You and the Township right now have a disagreement over you and your brother's property which is located over off Elm Street. We are going to resolve that and it will probably be resolved in litigation. I am not gonna stand here and debate these issues with you. That is not what Citizens Forum is for.

Eichenlaub: What is Citizens Forum for? [sic]

Peck: Citizen's Forum is for you to address the Board on concerns, now we have addressed [sic]. Not for you to come in here and just give us a bunch of blanket representations on why you think the Township is being run improperly. You don't want to hear what we got [sic] to say, you disagree with the letter we sent you. That's fine. You can disagree, alright? But we disagree on this issue, alright? And we're gonna disagree.

* * *

Eichenlaub: Yes, and I just wanting [sic] to ask the township since we like to enforce everything so evenly, if there has been anybody else that has to adhere to 7 pages of notes . . . comments . . . for a building permit.

Peck: We're not gonna get into that. We're not gonna get into that. If you have a complaint about those letters, put it in writing and we will address them in writing. Citizen's Forum is not . . . .

Eichenlaub: Your just gonna be a party then to the selective enforcement of the rules of the township.

Peck: I'm not gonna be a party to any selective enforcement.

Eichenlaub: Well, I'm sitting here bringing it to your attention and you are telling me you don't read the correspondence for the township . . . and I'm bringing it to your attention personally . . . (Peck gaveling) [sic] . . . you chose not to do anything about it so basically you are being a party to the selective enforcement of the rules of Indiana Township.

Peck: Do you have anything else you would like to address the Board with?

Eichenlaub: Yes, I would like to address some . . . some other issues. If you don't believe that there is any selective enforcement going on in Indiana Township I would be happy to come by here tomorrow and any other day and take you and the rest of the Board Members around and show them real violations of other residents, of other construction projects, of other developments in this township that have had nothing done to them. And if you are interested.

* * *

Peck: Dave, what else do you want? Do you have anything else to address, if not I'm gonna have to have you removed from the meeting because your not. . . .

Eichenlaub: I want to know if you are a party to the selective enforcement of the rules of Indiana Township . . .

* * *

Peck: Sergeant King would you remove Mr. Eichenlaub from the meeting please? He will not listen to anything we are trying to tell him.

Eichenlaub: Well, you can remove me from the meeting and you can do whatever you want but you are clearly a party to the activities that go on here at Indiana Township and you don't want to do anything about it. They are all right here in front of you and I will not, Mr. King I will go out with him, that not a big deal, but I will be back for next months [sic] meeting and so maybe Mr. King will come by even earlier

> and you can you know, improperly throw me out of another meeting. Because I am not going away because you are all a party to this activity that goes on here in the Township. And we're not, I'm not going to tolerate it.

Ex. to Defs.' Mot. for Summ. J. at Tab E.[3]

Township Ordinance 210.06 requires the Board to select one member to act as the Township's mayor and to preside over its public meetings. Doc. 35 at 4. Township Ordinance 210.09 further authorizes the mayor to preserve order and decorum at public meetings. *Id.* Defendant Claus testified during her deposition that the Township's Ordinances also establish a five minute time limit for individuals who address the Board during the Citizen's Forum. Doc. 68 at 8. However, she also stated that the ordinance had not been enforced during her seventeen years as a Board member. *Id.*

4. North Hills News Record Article

On September 18, 1999, a local newspaper, the North Hills News Record, published a brief five paragraph summary of the Board meeting's events in its 'At a Glance' column. The article's title, 'Indiana Twp. Police Pull Man from Meeting', announced the incident which occurred during the Citizens Forum on September 14, 1999 and its text identified David Eichenlaub as the individual who was involved in the confrontation. It described the exchange between Peck and Eichenlaub and their disagreement regarding the process used by the Township with respect to the approval of grading permits. The article also referenced a statement from Brozek which indicated that David Eichenlaub had been cited for grading permit violations in the Fairview Gardens

---

[3] It appears that the parties' exhibits to their motions were inadvertently misplaced during the consolidation of civil actions 99-1607 and 99-1667. The parties duplicates of their exhibits have been placed into the file.

development. A correction published in The North Hills News Record on September 28, 1999 clarified the action taken by the Township and reported that David Eichenlaub's request for a building permit had been denied but that he had not been cited for grading permit violations. *See* Ex. C of dep. transcript of Mary Ann Thomas.

During the interim between the initial article and the subsequent correction, Lincoln Warehouses, Inc., a client of Ike Construction, notified David Eichenlaub on September 22, 1999, that it would no longer conduct business with his company because he was removed from a Board meeting and cited for grading permit violations. Doc. 75 at 14.

5. Incidents of Retaliation

The plaintiffs represent Peck as being "particularly active in his efforts to retaliate against David Eichenlaub" and allege several occasions in which Peck disparaged Eichenlaub. *Id.* Their opposition to the defendants' Motions for Summary Judgment includes an affidavit from Wesley R. Biery (Biery) which states that Peck represented Eichenlaub as litigious and advised him not to associate with Eichenlaub. *Id.* at 15. Defendant Claus similarly testified at her deposition that Peck made negative statements about David Eichenlaub at a meeting of the Walnut Woods Homeowners Association that characterized him as a "radical" individual. *Id.* at 16.[4]

Claus' deposition testimony also revealed a decision made by the Board on March 27, 2001, during its executive session. This agreement involved the Board's refusal to sign forms required by utility companies before they would commence service. *Id.* at 17; Supplemental App. In Opp'n. To Defs.' Mot. For Summ. J. Ex. B, Claus Dep. at 188. This action

---

[4] Peck also made derogatory statements against the plaintiffs' counsel to Edward Warchol, Borough Manager and Secretary of Aspinwall, Pennsylvania.

affected property owned by the plaintiff, and according to Claus' testimony, it effectively achieved the result sought by a lawsuit that the Board wanted to file against the plaintiffs. Supplemental App. In Opp'n. To Defs.' Mot. For Summ. J. Ex. B, Claus Dep. at 188. Although the excerpt of Claus' deposition in the record does not describe the full context of the Board's decision, her testimony did specifically set out the decisions that were made during the course of the meeting:

> I recall an executive session where the five supervisors, the manager and the solicitor were present, and we – it was discussed that legal action should be taken against Mr. Eichenlaub to stop his activities over there. However, after further discussion, there were some documents from the utility companies that required the township to sign off on them, and if we did not sign off on them, it would have the same effect as taking legal action. So it was my understanding that anything that we discussed as far as formal action, a vote has to be taken at a public meeting. So I didn't speak up at the time of the discussion because I expected a vote to be taken out front and I could voice my feelings at that time, but a decision was made not to sign off on them, and it was never voted on in public.

Id.

In their opposition to the defendants' motions the Plaintiffs also claim that Brozek drafted a defamatory letter in January 2000 that assailed David Eichenlaub's credibility and characterized his conflicts with the Township as being selfish and disruptive. Doc. 75 at 16-7. Although Brozek allegedly circulated this letter to members of the Board, he did not send a copy to David Eichenlaub. *Id.*

Additionally, the scenario of retaliation as portrayed in the plaintiffs' opposition brief also includes allegations that Brozek's friend, Jacquelyn Sippel (Sippel), who is also a

Township employee, transmitted false information to the Allegheny County Assessment Office which resulted in a ten-fold increase in the plaintiffs' tax assessment. *Id.* at 18. Sippel acknowledged during her deposition that she resided with Brozek; however, she denied speaking with him about the plaintiffs' lawsuits. *Id.* at 18 n. 7.

C. Legal Standard

A motion for summary judgment under Federal Rule of Civil Procedure 56 is appropriately granted if the pleadings and discovery material, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Childers v. Joseph*, 842 F.2d 689 (3d Cir. 1989). A genuine dispute about a material fact arises when "the evidence is such that a reasonable jury could return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The party moving for summary judgment need only point out to the district court that there is an absence of evidence to support the non-moving party's claims; it need not support its motion with affidavits or similar materials that negate the opposing party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The non-moving party must establish the elements crucial to its case upon which it has the burden of proof. "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motions, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

D. Discussion

Amended Complaint in 99-1607

Count I – Federal Civil Rights: 42 U.S.C. § 1983

Section 1983 creates a civil action which relates to "the misuse of power possessed by virtue of state law and made

possible because the defendant was clothed with the authority of the state." Palace v. Deaver, 838 F.Supp. 1016, 1019 (E.D. Pa. 1993). It does not create substantive due process rights; rather, it serves as a remedy for a deprivation of rights secured by the United States Constitution or federal laws. Baker v. McCollan, 443 U.S. 137 (1979).[5]

To prevail in an action filed under the provisions of 42 U.S.C.A. § 1983, a plaintiff must establish that a defendant acting under the color of state law deprived the plaintiff of a right secured by the Constitution or the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Therefore, a viable Section 1983 claim must allege (1) a deprivation of a federal right by (2) an individual acting under color of state law. *Palace*, 838 F.Supp. at 1019.

1. Federal Right at Issue

a. First Amendment

Count I of the Amended Complaint filed in civil action 99-1607 alleges that the defendants abridged David Eichenlaub's constitutional rights by:

a. determining to exclude Mr. Eichenlaub from public meetings of the Board of Supervisors due to the

---

[5] The text of 42 U.S.C.A. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. § 1983.

content or anticipated content of his comments to the Board;

b. physically removing or causing or directing that Mr. Eichenlaub be physically removed from public meetings of the Board of Supervisors based upon the content or anticipated content of his comments to the Board;

c. adopting, implementing and continuing a policy or custom of the Township and the Board of Supervisors to prohibit or hinder Mr. Eichenlaub from speaking at public meetings of the Township Board of Supervisors based upon the content or anticipated content of his comments to the Board;

d. adopting, implementing and continuing a policy or custom of the Township and the Board of Supervisors to prohibit or hinder Mr. Eichenlaub from speaking in a recognized public forum on topics of public concern;

e. adopting, implementing and continuing a policy or custom of the Township and the Board of Supervisors to retaliate against Mr. Eichenlaub based upon the content or expected content of his comments to the Board; and

f. adopting, implementing and continuing a policy or custom of the Township and Board of Supervisors to retaliate against Mr. Eichenlaub based upon his exercise of his right of freedom of speech as guaranteed by the United States Constitution.

Doc. 42 Ex. A § 45. Collectively, these allegations raise claims under the petition clause of the First Amendment of the United States Constitution. *See Livingstone v. North Belle Vernon Borough*, 92 F.3d 515, 535 (3d Cir. 1996) (The First Amendment's petition clause protects a citizen's right of access to governmental mechanisms for the redress of

grievances.)[6] Relatedly, the Plaintiffs claim that David Eichenlaub's criticisms implicated two distinct customs and policies which violated his constitutional rights. The first custom or policy claim, which is alleged in paragraphs 45a through 45d of the Amended Complaint, alleges that the defendants restricted David Eichenlaub from speaking in Township forums on matters of public concern. In their second custom or policy claim, which is stated in paragraphs 45e and 45f of the Amended Complaint, the Plaintiffs allege that the defendants retaliated against David Eichenlaub and that their actions were motivated by the content of his speech.[7]

To resolve the issue of whether the defendants had formed a custom or policy that excluded David Eichenlaub from speaking in public forums, the court must apply the "forum based test" developed by the United States Supreme Court. *Zapach v. Dismuke*, 134 F.Supp.2d 682, 685 (E.D. Pa. 2001) (*citing Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 797 (1985)). The forum based test evaluates these three factors:

---

[6] The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

[7] Under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), an official custom or policy creates municipal liability under Section 1983. *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691-92 (1978).

> (1) whether the plaintiff's speech is protected by the First Amendment; (2) the nature of the forum: public, designated or limited public or nonpublic; and (3) whether the defendant's justifications for limiting the plaintiff's speech satisfy the requisite standard.

Zapach, 134 F.Supp.2d at 685 (*citing Cornelius*, 473 U.S. at 797).

A governmental body creates a designated public forum when it invites public commentary during its meeting. *Zapach*, 134 F.Supp.2d at 689. Additionally, "[d]esignated public fora are those that the government opens for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 688 (*quoting Cornelius*, 473 U.S. at 802). The parties acknowledge that the Board opened its meeting to the public during the Citizens Forum for discussion of community issues. Accordingly, the present record clearly demonstrates that David Eichenlaub spoke in a designated public forum.

The parties' disputes regarding the first and third elements of the forum based test require the court to analyze the nature of David Eichenlaub's speech and the defendants' rationale for removing him from the Board meeting.

The plaintiffs characterize the substance of David Eichenlaub's speech as a matter of public concern. Doc. 75 at 23. Discourse involving public issues and governmental affairs is the most protected form of speech under First Amendment jurisprudence. *Id.*, at 685 (*citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)). In contrast, speech which involves private matters does not enjoy heightened First Amendment protection. *See Flamm v. American Association of University Women*, 201 F.3d 144, 149 (2d Cir. 2000); *Pappas v. Guiliani*, 290 F.3d 143, 146 (2d Cir. 2002). The United

States Court of Appeals for the Fourth Circuit had defined a public controversy as follows:

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.... [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention.... Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.

Dobkin v. Johns Hopkins University, 1999 WL 22901, at *5 and 6 (4th Cir. Jan. 21, 1999) (*quoting Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1554 (4th Cir. 1994)).[8]

The topics of David Eichenlaub's speech, *viz.*, enforcement of the Township's ordinances and its administration, are subjects that generally fall within the public domain. However, the specific actions Eichenlaub challenged were taken against his family's property interests and he did not connect the selective enforcement question to a public

---

[8] The United States Court of Appeals for the Third Circuit has articulated a test that defines public versus private concern speech in the context of retaliation claims filed by government employees. *See e.g. Watters v. City of Philadelphia*, 55 F.3d 886 (3d Cir. 1995); *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996); *Azzaro v. Allegheny County*, 110 F.3d 968 (3d Cir. 1997); *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997). These cases generally cite the opinion of the United States Supreme Court in *Connick v. Myers*, 461 U.S. 138 (1983), and define public concern speech by resolving this issue: whether the speaker attempts to "bring to light actual or potential wrongdoing or breach of public trust" in a forum that is outside of the government office in which he or she is employed. *Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993). The court will not apply this test here because the plaintiffs are not municipal employees.

controversy; that is, he failed to show that the ramifications of the actions taken by the Township affected other persons or entities who were not direct participants, such as developers or other property owners. Significantly, Eichenlaub's statements evidence the plaintiffs' personal disagreements with the Township and do not demonstrate a conflict that would eventually affect the well-being of the aggregate community. Therefore, David Eichenlaub's speech during the Citizens Forum did not debate public issues and does not qualify for the highest level of First Amendment protection.

Furthermore, the expulsion of David Eichenlaub from the Board meeting did not violate the time, place and manner test which governs limitations of speech in public forums. A governmental body may place time, place and manner restrictions on speech in a designated public forum if:

> (1) the restrictions are justified without reference to the content of the regulated speech, (2) they are narrowly tailored to serve a significant governmental interest, and (3) they leave open ample alternative channels for communication of the information.

Zapach, 134 F.Supp.2d at 690 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The parties' time, place and manner arguments focus on the content of David Eichenlaub's speech and, when considered in juxaposition, present a rather distinct contrast. The plaintiffs argue that the Board prohibited him from speaking during the Citizens Forum because of the content of his speech. Doc. 75 at 24. Content based restrictions are subject to strict scrutiny and must be narrowly drawn and related to a compelling state interest. *Zapach*, 134 F.Supp.2d at 690 (*citing Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 44 (1983) and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

However, the defendants argue that David Eichenlaub was removed from the meeting because his behavior was disruptive and disorderly. Doc. 68 at 13. A restriction which is not " 'aimed at the content of the speech but at the 'secondary effects' generated by or associated with the speech" is content neutral. *Id.* (*quoting City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986)). An example of a content neutral restriction which may have an incidental effect on a speaker and their message is "[t]he government['s] . . . significant interest in the orderly and efficient conduct of its business" that permits the exclusion of speakers who are disruptive or repetitive. *Id.* at 692 (citing cases).

The transcript of the Citizens Forum shows clearly that David Eichenlaub spoke at length, presented his views and gave his perceptions of the selective enforcement of the Township's ordinances. It also demonstrates that Peck and Eichenlaub disputed whether the Citizens Forum was an appropriate venue to discuss and debate Eichenlaub's personal concerns. Eichenlaub repeatedly voiced his beliefs that his family had been targeted for selective enforcement of its ordinances, and in response, Peck informed him that the Board would not address that matter during the Citizens Forum. Peck specifically told Eichenlaub that the Board considered the enforcement issue to be the plaintiffs' personal grievance and stated that the issues raised and discussed by Eichenlaub would be eventually resolved through litigation. He advised Eichenlaub:

> We are not going to use the Citizens Forum as [a] means for you to debate your disagreements with the Township. You and the Township right now have a disagreement over you and your brother's property which is located over off Elm Street. We are going to resolve that and it will probably be resolved in litigation. I am not gonna stand here

> and debate these issues with you. That is not what [the] Citizens Forum is for.

Ex. to Defs.' Mot. for Summ. J. at Tab E.

After clearly stating the Board's position, Peck asked Eichenlaub several more times if he had any other business that he wanted to bring to the Board's attention. Once it became rather evident that their disagreement regarding the purpose of the forum and the nature of Eichenlaub's questions could not be resolved, Peck asked a police officer to escort Eichenlaub from the meeting.

The court recognizes that "[t]he First Amendment extends not only to the content of a person's speech, but to the speaker himself." *Wilkinson v. Bensalem Township*, 822 F.Supp. 1154, 1158 (E.D. Pa. 1993). Furthermore, a state actor cannot "restrict a person's right to speak based on their identity [because this type of limitation] could quickly lead to the censorship of particular points of view." *Wilkinson*, 822 F.Supp. at 1158 (*citing* Laurence H. Tribe, American Constitutional Law, § 12-3 at 796 (2d ed. 1988)).

The plaintiffs' opposition brief cites several incidents in which Peck articulated his personal animosity for David Eichenlaub to members of the community. However, although the Board did not address the subject matter of David Eichenlaub's questions and although Peck apparently disliked Eichenlaub, the transcript demonstrates that Eichenlaub was expelled from the meeting after his conduct became argumentative, repetitive and disruptive. The following excerpts from the transcript of the Citizens Forum shows the heightened argumentative progression of Eichenlaub and Peck's discussion:

> Eichenlaub: Yes, and I just wanting [sic] to ask the township since we like to enforce everything so evenly, if there has been anybody else that has to adhere to 7 pages of notes . . . comments . . . for a building permit.

Peck: We're not gonna get into that. We're not gonna get into that. If you have a complaint about those letters, put it in writing and we will address them in writing. Citizen's Forum is not . . . .

Eichenlaub: Your just gonna be a party then to the selective enforcement of the rules of the township.

Peck: I'm not gonna be a party to any selective enforcement.

Eichenlaub: Well, I'm sitting here bringing it to your attention and you are telling me you don't read the correspondence for the township . . . and I'm bringing it to your attention personally . . . (Peck gaveling) [sic] . . . you chose not to do anything about it so basically you are being a party to the selective enforcement of the rules of Indiana Township.

Peck: Do you have anything else you would like to address the Board with?

Eichenlaub: Yes, I would like to address some . . . some other issues. If you don't believe that there is any selective enforcement going on in Indiana Township I would be happy to come by here tomorrow and any other day and take you and the rest of the Board Members around and show them real violations of other residents, of other construction projects, of other developments in this township that have had nothing done to them. And if you are interested.

* * *

Peck: Dave, what else do you want? Do you have anything else to address, if not I'm gonna

have to have you removed from the meeting because your not . . .

Eichenlaub: I want to know if you are a party to the selective enforcement of the rules of Indiana Township . . .

Ex. to Defs.' Mot. for Summ. J. at Tab E.

Given the evidence from the transcript of the Citizens Forum, reasonable fact finders could not dispute that: (1) Peck gave Eichenlaub an opportunity to ask questions; (2) Eichenlaub persisted in raising the same issues after Peck declined to discuss them; and (3) Eichenlaub's comments were repetitious. Therefore, Eichenlaub's expulsion did not result directly from the content of his speech and did not violate his First Amendment rights. *Zapach*, 134 F.Supp.2d at 692.[9]

b. Retaliation

The plaintiffs' substantive claim is that the defendants engaged in retaliatory conduct because of the comments that David Eichenlaub made during the Citizens Forum. Am. Compl. ¶¶ 45e and 45f.

Under the doctrine of unconstitutional conditions, the United States Court of Appeals for the Third Circuit recognizes that "official retaliation for the exercise of any constitutional right creates an actionable claim under Section 1983." *Anderson v. Davila*, 125 F.3d 148, 162 (3d Cir. 1997). In the context of the First Amendment, the doctrine instructs that the "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom

---

[9] In their opposition brief, the plaintiffs claim that *Wilkinson* is an analogous case. Doc. 75 at 24-5. However, the facts in *Wilkinson* are dissimilar because the plaintiff's speech involved issues of public concern and the plaintiff was never permitted to raise his opinions at the defendants' meeting. *See Wilkinson*, 822 F.Supp. at 1158-9.

of speech' even if he has no entitlement to that benefit." *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996) (*quoting Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Moreover, in retaliation cases that arise under the petition clause of the First Amendment, the Court of Appeals has held:

> "[W]hen government – federal or state – formally adopts a mechanism for redress of grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

San Filippo v. Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994).

Accordingly, retaliation caused by an exercise of First Amendment rights is actionable under Section 1983 even if the speech did not involve matters of public concern. *Anderson*, 125 F.3d at 162.

The factual scenario of retaliation alleged by the plaintiffs includes several distinct incidents. The first, which involved reports authored by Curti and sent to the Allegheny County Conservation District during July 1999, occurred prior to David Eichenlaub's appearances at the Board meetings in August and September 1999. Likewise, although the allegations of Peck's disparaging comments evidence his dislike for Eichenlaub, the Plaintiffs have not connected those statements to specific instances of retaliatory behavior.

However, other evidence of retaliation raises issues regarding the motives which underlie the defendants' actions. Specifically, a fact finder must examine the circumstances which motivated the Board's decision to refrain from signing the documents that the plaintiffs needed in order to obtain utility service. *See Sameric Corporation of Delaware, Inc. v.*

City of Philadelphia, 142 F.3d 582, 594 n. 10 (3d Cir. 1998) (Genuine issues regarding improper motives of bias must be resolved by a fact finder.) Additionally, Sippel's personal relationship with Brozek casts doubt upon the credibility of her deposition statements in which she claims that she had not discussed this litigation with him. Accordingly, a fact finder must assess whether Sippel's decision to place the Eichenlaub's properties on the list given to the Allegheny Count Tax Assessment Office was based on improper motives. *See Anderson*, 477 U.S. at 255. ("Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge.")

2. State Actors

a. Municipal Liability

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) the Supreme Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), by holding that local governments could be sued as "persons" under § 1983 when:

> . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers. Moreover . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decision making channels.

Monell, 436 U.S. at 691-92.

The direct liability of a municipality is implicated by an official custom or policy, or when the municipality has a policy of deliberate indifference which has resulted either from an officially adopted and promulgated decision or from a well settled practice. *Simmons v. City of Philadelphia*,

947 F.2d 1042, 1059 (3d Cir. 1991). Three distinct factual circumstances can establish a custom or policy:

1. A municipal employee acts in accordance with a formal policy or a long standing operating procedure;
2. An individual with policy making authority acts in circumstances where his or her behavior becomes an official act of government policy;
3. An individual with policy making authority ratifies the unconstitutional actions of a subordinate.

Katzenmoyer v. City of Reading, Pennsylvania, 158 F.Supp.2d 491, 500 (E.D. Pa. 2001). Additionally, "a course of conduct is considered to be a custom when, though not authorized by law, such practices of state officials are so permanent and well settled as to virtually constitute law." *Monell*, 436 U.S. at 691.[10]

The evidence of retaliation in the present record involves a Board decision that purportedly deprived the plaintiffs of utility service. Because this agreement was the official act of individuals who had policy making authority, it implicates municipal liability.

b. Individual Defendants

1. Official Capacity

The Amended Complaint in civil action 99-1607 named Claus, Dull, Federoff, Taylor, Curti and Brozek as defendants in their official capacities. In *Monell*, the United States Supreme Court stated "there is no longer a need to bring official-capacity actions against local government officials . . . [because] local government units can be sued directly for damages and injunctive or declaratory relief." *Monell*,

---

[10] Municipal liability also arises from a failure to properly train its employees. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). The court will not address this theory of municipal liability because the Amended Complaint does not explicitly or implicitly raise failure to train issues.

436 U.S. at 690. Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 169 n. 14 (1985). Accordingly, the plaintiffs' official capacity claims against the individual defendants are superfluous and summary judgment is appropriate.[11]

2. Personal Capacity

Peck is the only defendant sued in his personal capacity in civil action 99-1607. A personal capacity claim against an individual defendant under Section 1983 "seek[s] to impose personal liability upon a government official for action he takes under color of state law." *Graham*, 473 U.S. at 165. To establish personal liability, a plaintiff must plead and prove the defendant was either directly involved in the unconstitutional conduct or had actual knowledge of and acquiesced in wrongful actions. *Rode v. Dellarciprete*, 845 F.2d 1197, 1207 (3d Cir. 1988).

As a member of the Board, Peck participated in a decision that caused the plaintiffs to be denied utility service. In turn, the possible retaliatory nature of that action creates factual issues of personal capacity liability.

The defense of qualified immunity applies to government officials who have been sued in their personal capacity under Section 1983. *Douris v. County of Bucks*, No. Civ. A. 99-3357, 2001 WL 767579, at *6 (E.D. Pa. July 3, 2001). Qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

---

[11] The court also recognizes the general rule that " 'a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act.' " *Wilkinson*, 822 F.Supp. at 1160 (*citing Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988).

reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To resolve a qualified immunity issue, the court should initially determine whether the plaintiff has alleged a deprivation of a constitutional right. *County of Sacramento et al. v. Lewis*, 523 U.S. 833, 842 n.5 (1998). The court's analysis must also consider whether the right allegedly violated was clearly established during the relevant time period. *Id.* "A right is 'clearly established' for qualified immunity purposes only if 'the contours of the right' are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Larsen v. Senate of the Commonwealth of Pennsylvania*, 154 F.3d 82, 87 (3d Cir. 1998) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1982)).

The historical roots of the right to petition the government for redress were formed well before the Bill of Rights. *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994). Furthermore, a reasonable official should have understood that retaliation for the exercise of a First Amendment right is unlawful. *Anderson*, 125 F.3d at 162. Therefore, given the outstanding factual issues which are related to the retaliation claim, qualified immunity cannot shield Peck from personal liability.

2. Summation of Count I

The court should grant the defendants' Motions for Summary Judgment with respect to the claim that David Eichenlaub's First Amendment rights were violated when he was removed from the Board meeting on September 4, 1999. His speech during the Citizens Forum involved issues of private rather than public concern and Peck had a content neutral reason to remove Eichenlaub from the meeting. The court should also grant the defendants' Motions for Summary Judgment with respect to the official capacity claims because, again, they are merely another form of municipal liability.

However, there are issues of material fact regarding whether the defendants retaliated against David Eichenlaub

because of the comments he made during the Citizens Forum. In turn, the issues of retaliation impute both municipal liability and Peck's personal capacity liability under Section 1983. Accordingly, the court should deny the defendants Motions for Summary Judgment with respect to the retaliation claims against the Township as well as Peck.

Count II – Defamation: 42 Pa. Con. Stat. Ann. Section 8343(a)

The defamation claim alleged in Count II is based exclusively on the article published by the North Hills News Record on September 18, 1999. The Amended Complaint alleges that each individual defendant participated in the publication of the defamatory statements. Brozek and Curti allegedly discussed the cause of David Eichenlaub's removal from the September 14, 1999, meeting with a reporter from the newspaper and the Board, Brozek and Curti "stated or implied" that David Eichenlaub violated ordinances and disregarded local laws when he constructed homes in the Township. Am. Compl. ¶¶ 55 and 56. However, the only quotation printed in the article was Brozek's statement that David Eichenlaub had not obeyed the Township's grading ordinance. The Amended Complaint specifically characterizes Brozek's statements as slander *per se* because they imply that David Eichenlaub's business, Ike Construction, violated local laws and ordinances. *Id.* ¶¶ 61-63.

In their opposition brief, the plaintiffs' concede this part of their action. They apparently will seek leave of the court to withdraw their defamation claim against the Township and they will abandon the cause of action with respect to Claus, Dull, Federoff, Taylor and Curti, if no additional evidence of defamation is revealed during the pendency of this consolidated lawsuit. Doc. 75 at 56. Accordingly, Brozek and Peck are the only defendants that the court will consider in its analysis of Count II.

The tort of defamation as defined by Pennsylvania law requires the plaintiff to prove seven elements:

1. The defamatory character of the communication;
2. Its publication by the defendant;
3. Its application to the plaintiff;
4. The understanding by the recipient of its defamatory meaning;
5. The understanding by the recipient of it as intended to be applied to the plaintiff;
6. Special harm resulting to the plaintiff from its publication; and
7. Abuse of a conditionally privileged occasion.

42 Pa. Con. Stat. Ann. section 8343(a).

Brozek's statements in the newspaper article is the basis of the defamation claim that was alleged in the Amended Complaint. Doc. 75 at 46-8. Because Brozek was sued in his official capacity, the defendants argue that the Pennsylvania Political Subdivision Tort Claims Act (PSTCA) shields him from liability. Doc. 68 at 16-18; Doc. 35 at 15-18. The statute's general grant of immunity states:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa. Con. Stat. Ann. section 8541.

Although the plaintiffs indicate that they will not pursue their defamation claim against the Township, the PSTCA resolves Brozek's liability given that the plaintiffs have sued him in his official capacity. Significantly, the real party in an official capacity suit is the governmental entity rather than the individual, and section 8541 immunizes the Township against defamation claims. *Smith v. School District of Philadelphia*, 112 F.Supp.2d 417, 424-5 (E.D. Pa. 2000)

(*quoting Hafer v. Melo*, 502 U.S. 21, 25 (1991)). Therefore, irrespective of the merits of the plaintiffs' claims, Brozek cannot be held liable for his statements that were printed in the North Hills News Record. *Satterfield v. Borough of Schuylkill Haven*, 12 F.Supp.2d 423, 442 (E.D. Pa. 1998); *Smith*, 112 F.Supp.2d at 424-5; *Austin v. Neal*, 933 F.Supp. 444, 457 (E.D. Pa. 1996).

The plaintiffs' opposition brief also represent Peck's subsequent comments to the Walnut Woods Homeowners Association (Homeowners Association) as being defamatory. Doc. 75 at 16-18. Clearly, Peck's subsequent comments to the Homeowners Association did not occur in the context of the North Hills News Record article and consequently were not explicitly alleged in the Amended Complaint. Where matters outside of the pleadings have been raised to oppose a Motion for Summary Judgment, the Federal Practice and Procedure treatise provides the following guidance:

> The formal issues framed by the pleadings are not controlling on a motion for summary judgment; the court must consider the issues presented by the other material offered by the parties on the motion to determine whether the Rule 56 request should be granted. Thus the court will examine the pleadings to ascertain what issues of fact they present and then consider the affidavits, depositions, admissions, answers to interrogatories and similar material to determine whether any of these issues are real and genuine and whether any of the postpleading material suggests the existence of any other triable genuine issues of material fact. . . . Given this process, the court is obliged to take account of the entire setting of the case on a Rule 56 motion.

10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d § 2721.

The facts of this lawsuit include Claus' disclosure during her deposition of Peck's statements to the Homeowners

Association. Supplemental App. in Opp'n. to Defs.' Mot. for Summ. J. at 61. She stated that Peck attended the Homeowners Association meeting because he was the supervisor who represented the residents of the Walnut Woods development. *Id.* She further stated that Peck detailed the facts of this litigation in his report of the Township's business and made comments about David Eichenlaub, which in her opinion, cast him in a negative light and made him appear to be "radical". *Id.* at 63-4. However, Claus could not recall Peck's exact words nor could she paraphrase his statements. She testified only to her "impression" and said that Peck's statements made the Board appear to be "a bunch of little kids trying to get this group on our side and that group on the other side and swing people over to your line of thinking." *Id.* at 62.

Under Pennsylvania law, the court must determine whether a statement is capable of defamatory meaning. *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997). Generally, "communications [that] tend to lower a person in the estimation of the community, deter third persons from associating with him [or her], or adversely affect his [or her] fitness for the proper conduct of his lawful business or profession . . . are deemed defamatory." *Green*, 692 A.2d at 172.

Here, the court cannot analyze the nature or context of Peck's statements to the Homeowners Association because the present record contains only Claus' impressions of those comments. Her characterizations and opinions only demonstrate the effect that Peck's statements had on Claus rather than the aggregate audience. Moreover, a defamation claim fails as a matter of law unless the plaintiff specifically establishes the content of a defamatory communication. *See Spain v. Vicente*, 315 Pa. Super. 135, 140, 461 A.2d 833, 836 (1983); *Raneri v. Depolo*, 65 Pa.Commw. 183, 441 A.2d 1373 (1982); *Gross v. United Engineers and Constructors, Inc.*, 224 Pa.Super. 233, 302 A.2d 370 (1973).

Given that Claus' memory of the incident did not substantiate or detail the content of Peck's comments to the Homeowners Association, the plaintiffs cannot use that incident to raise factual issues to overcome the defendants Motions for Summary Judgment.[12]

Amended Complaint in Civil Action 99-1667

The Amended Complaint in civil action 99-1667 alleges four causes of action arising from the plaintiffs' attempts to develop their properties in Fairview Gardens and on Saxonburg Boulevard: (1) substantive due process; (2) equal protection; (3) conspiracy under 42 U.S.C. § 1985(3) and (4) mandamus under Pennsylvania law. *See* Doc. 77.

As a preliminary matter, the court must address the ripeness argument raised by the defendants with respect to the Saxonburg Boulevard property. *See* Doc. 70 at 4. Specifically, the defendants contend that the plaintiffs may not raise federal constitutional claims regarding the Saxonburg Boulevard property because they have not appealed the decisions of Township officials to the Zoning Hearing Board, the Board of Supervisors or the courts of Pennsylvania. Doc. 70 at 7.

The Court of Appeals for the Third Circuit has held that " . . . in cases involving land use decisions, a property owner does not have a ripe, constitutional claim until the zoning authorities have had 'an opportunity to arrive at a final, definitive position regarding how [they] will apply the regulations at issue to the particular land in question.' " *Sameric Corporation of Delaware, Inc.*, 142 F.2d at 597 (*quoting Taylor Inv. Ltd v. Upper Darby Twp.*, 983 F.2d

---

[12] In the brief supporting their Motion for Summary Judgment the defendants also argue that the defamation claim of Ike Construction is barred by the one year statute of limitations set forth in 42 Pa. Con. Stat. Ann. § 5523. Because the court has concluded that Count II does not survive summary judgment, it will not address the statute of limitations argument.

1285, 1291 (3d Cir. 1993)) (internal citations omitted). In light of this precedent, the defendants' ripeness argument neglects two crucial facts: (1) the Board approved the plaintiffs' site plan for Saxonburg Boulevard property on June 13, 2000; and (2) the Township's Zoning Hearing Board is subordinate to the Board and cannot review the supervisors' decisions. *See* 53 Pa. Stat. Ann. Section 10909.1(a). Moreover, unless there is statutory authority to the contrary, the remedies of Section 1983 supplement state remedies, and a plaintiff is not required to either seek or exhaust state administrative procedures before he or she files the federal statutory claim. *See Monroe*, 365 U.S. at 183, *overruled on other grounds by Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978); *see also Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982) and *McNeese v. Board of Educ.*, 373 U.S. 668, 674 (1963). Accordingly, the court will address the causes of action alleged in the Amended Complaint with respect to the Saxonburg Boulevard property.

Count I – Substantive Due Process

In *Bello v. Walker*, 840 F.2d 1124, 1128 (3d Cir.) *cert. denied*, 488 U.S. 851 and 868 (1988), the Court of Appeals held that a plaintiff could raise a successful substantive due process violation by establishing that an arbitrary abuse of governmental power deprived them of the full use of their real property *Bello*, 840 F.2d at 1128-9. In *Bello*, the Court of Appeals reasoned that substantive due process "[secures] the individual from the arbitrary exercise of the powers of government." *Bello v. Walker*, 840 F.2d 1124, 1128 (3d Cir. 1988) (internal citations omitted). Because arbitrary action is the "touchstone" of due process, a plaintiff must allege a deprivation that "contain[s] some element of governmental power." *Id.* at 1129 (internal citations omitted). To be successful in a substantive due process claim, a plaintiff must prove that: "(1) . . . the government's actions were not rationally related to a legitimate government interest; or

(2) . . . 'the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive . . . .' " *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 693 (3d Cir. 1993) (*quoting Midnight Session, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) *cert. denied* 503 U.S 984 (1992)). The first element is a question of law which the court determines; the second element is a question of fact which a jury resolves. *Parkway Garage*, 5 F.3d at 693.[13]

Arguably, the defendants scrutiny of the plaintiffs' grading activities as well as their subdivision and development plans

---

[13] The court recognizes that the dissenting opinion authored by Circuit Judge Alito in *Phillips v. Borough of Keyport*, 107 F.3d 164, 183 (3d Cir. 1997) questioned the merits of *Bello*'s underlying rationale. Judge Alito emphasized that the panel in *Bello* based its decision on United States Supreme Court precedent which consisted of procedural rather than substantive due process decisions. *Phillips*, 107 F.3d at 184-6. He criticized *Bello*'s reasoning by explaining that it "overlooked the fact that the primary means by which due process protects against the arbitrary exercise of power by government officials is by requiring fair procedures, i.e., by requiring adherence to principles of *procedural* due process." *Id.* at 186 (emphasis in original). Judge Alito further observed that "[o]nly in extreme circumstances is it proper to invoke substantive due process" and that *Bello* transformed "mundane land-use disputes that belong in state court . . . into substantive due process claims cognizable under 42 U.S.C.A. § 1983." *Id.* at 187.

Although this court fully understands the rationale of Judge Alito's dissent in *Phillips*, the rule which permits a plaintiff to raise a substantive due process claim in a land use case through allegations of bias or improper motive, remains the law in this Circuit. Accordingly, the court, as it must, will adhere to the standards developed by the Third Circuit in its application of *Bello*. *See Parkway Garage*, 5 F.3d at 692; *Midnight Sessions*, 945 F.2d at 683; *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 263 (3d Cir. 1995).

relate to legitimate government interests. However, the aggregate factual scenario includes questions of improper motives and bias which must be resolved by a jury. *Id.* These factual issues also foreclose the defendants' assertions of qualified immunity because an abuse of governmental power which is the result of an improper motive "clearly [exceeds] the scope of qualified immunity." *Blanche Road Corporation v. Bensalem Township*, 57 F.3d 253, 269 (3d Cir. 1995). Accordingly, it would be inappropriate here for the court to accord the benefits of qualified immunity to the defendants.

Count II - Equal Protection

In *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000), the United States Supreme Court held that it is unnecessary for a plaintiff to be a member of a class or a group to maintain an equal protection claim under the Fourteenth Amendment. *Village of Willowbrook*, 528 U.S. at 1074-5. The defendants in *Village of Willowbrook* demanded a thirty-three foot easement from the plaintiff to connect to the municipality's water supply but required similarly situated property owners to provide only a fifteen foot easement. *Id.* at 1074. The Court reasoned that a "class of one" can raise an equal protection claim if a lone plaintiff has been subjected to intentional or arbitrary discrimination. *Id.* at 1075.

Although the Amended Complaint clearly alleges that the defendants treated the plaintiffs differently than other property owners who sought to develop preexisting subdivisions, the plaintiffs must go beyond the pleadings and demonstrate material factual issues of arbitrary conduct to survive the defendants' motions. *Celotex*, 477 U.S. at 322. Here, the Plaintiffs clearly have met this burden by citing to numerous instances where the defendants did not require property owners in subdivisions that had been established as early as 1951 to submit new plans before building single family homes during the late 1990's. *See* Doc. 34 at 31-4.

Therefore, with respect to this claim, the court should deny the defendants' Motions for Summary Judgment.

Count III – Conspiracy under 42 U.S.C. § 1985(3)

Section 1985(3) prohibits conspiracies predicated on "'racial, or perhaps otherwise class-based, invidiously discriminatory animus.' " *Ridgewood Board of Education v. N.E. for M.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (*quoting Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)). [14] To state a claim under Section 1985(3), the plaintiff must allege:

> (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons . . . [of] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Ridgewood Board of Education, 172 F.3d at 253-4 (*quoting Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir. 1997)).

---

[14] The relevant portion of 42 U.S.C. § 1985(3) states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

Given that neither racial nor class based animus form the plaintiffs' civil rights claims, their cause of action filed under Section 1985(3) must be dismissed as a matter of law.[15]

Count IV - Mandamus

Finally, the Amended Complaint in 99-1667 alleges that the plaintiffs are entitled to a Writ of Mandamus which compels the "unconditional approval" of the Fairview Gardens revised subdivision plan and the grading and site plan for the Saxonburg Boulevard property because the defendants failed to act on their applications in the time and manner stipulated by the Pennsylvania Municipalities Planning Code (MPC), 53 Pa. Stat. Ann. section 10101 *et seq.* Doc. 77 at ¶¶ 102 and 103.

"Mandamus is an extraordinary writ which will issue to compel performance by a governmental agency of a ministerial act, where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant and want of any other equitable and appropriate remedy." *Malone v. West Marlborough Township Board of Supervisors*, 131 Pa. Cmwlth. 347, 350, 570 A.2d 147, 149 (1990). Pennsylvania courts grant the writ in land use disputes that are governed by the MPC "where no decision has been rendered on an application or where the decision has been communicated to the applicant in an untimely manner." *Malone*, 131 Pa. Cmwlth. at 350-1, 570 A.2d at 149. The plaintiffs specifically argue that mandamus is appropriate because of these actions taken by the defendants: (1) Brozek's failure to provide written notice that the Board rejected the Fairview Gardens revised subdivision plan on April 27, 1999; (2) Brozek's failure to specify the

---

[15] Under Section 1985(3), the meaning of the word 'class' in this context "connotes something more than a group of individuals who share a desire to engage in conduct that the . . . defendant disfavors." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993).

contingencies of the Township engineer's recommendation that were factored into the Board's approval of the Fairview Gardens subdivision plan in his letter dated June 23, 1999; and (3) the Township's failure to act on both the plaintiffs' August 1998 grading permit application and the November 1999 site plan application for the Saxonburg Boulevard property within the ninety day time limit prescribed by the MPC. Doc. 34 at 37 - 40; Doc. 76 at 15 and 16.

The pertinent portion of the MPC states that:

> All applications for approval of a plat (other than those governed by Article VII), whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land development ordinance but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than 90 days following the date of the regular meeting of the governing body or the planning agency (whichever first reviews the application) next following the date the application is filed or after a final order of court remanding an application, provided that should the said next regular meeting occur more than 30 days following the filing of the application or the final order of the court, the said 90-day period shall be measured from the 30th day following the day the application has been filed.
>
> (1) The decision of the governing body or the planning agency shall be in writing and shall be communicated to the applicant personally or mailed to him at his last known address not later than 15 days following the decision.
>
> (2) When the application is not approved in terms as filed the decision shall specify the defects found in the application and describe the requirements which

> have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.
>
> (3) Failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented unless the applicant has agreed in writing to an extension of time or change in the prescribed manner of presentation of communication of the decision, in which case, failure to meet the extended time or change in manner of presentation of communication shall have like effect.

53 Pa. Stat. Ann. section 10508.

Pennsylvania courts interpret the first and second subsection of the Municipal Code as requiring either an oral explanation or a written decision that specifies the defects in a plan and a citation to the applicable statutes or ordinances. *Bensalem Township v. Blank*, 115 Pa.Cmwlth. 281, 286, 539 A.2d 948, 950 (1988). The provisions of subsection two are considered to be mandatory, and when a governing body denies an application, the "four corners" of its written decision must explicitly state the plan's deficiencies and the specific statute or ordinance that supports the rejection. *Bensalem Township*, 115 Pa.Cmwlth. at 288, 539 A.2d at 951. Furthermore, under subsection three, an application is "deemed" to be approved if a written decision fails to cite the statute or ordinance which supported the denial. *Id.*, 115 Pa.Cmwlth. at 286, 539 A.2d at 951. A "deemed approval" under the MPC is ". . . the 'conclusive presumption' that a zoning hearing board has ruled in the applicant's favor." *Rodier v. Township of Ridley*, 141 Pa. Cmwlth. 117, 119, 595 A.2d 220, 221 n.1 (1991). The purpose of the deemed approval provision "is to curb the evils of procrastination by forcing municipalities to take prompt action in approving or disapproving various

applications." *Rodier*, 141 Pa. Cmwlth. at 122, 595 A.2d at 223.

Pursuant to the MPC, the court should grant the plaintiffs' request for a writ of mandamus with respect to Brozek's failure to inform them in writing of the Board's vote in April 1999 which denied the revised subdivision plan for Fairview Gardens. Subsection one requires the governing body's decision to be communicated within fifteen days, and because Brozek admitted that he did not provide the plaintiffs with timely written notification of the decision made by the Board on April 27, 1999, subsection three entitles the plaintiffs to "deemed approval". Doc. 34 at 38.

Also, "deemed approval" under subsection three is appropriate with respect to the Saxonburg Boulevard grading permit and site plan applications given that the record clearly demonstrates that the Township's review in each of these instances was untimely under the MPC.

However, the deemed approval is not appropriate with respect to the revised subdivision plan for Fairview Gardens because it was ultimately approved by the Board on June 22, 1999. The decision was made in a timely manner, and the provisions of subdivision two, which require the timely specification of defects, are applicable only when applications are denied rather than approved.

Parenthetically, the court must caution the parties that a mandamus action under the MPC challenges the inaction of a governing body rather the content of its decision. *Croft v. Board of Supervisors of Middletown Township*, 76 Pa. Cmwlth. 488, 492, 464 A.2d 625, 627 (1983). Accordingly, the mandamus analysis engaged in by this court *supra* is related only to the technical requirements of the MPC and is not relevant to either the substance of the plaintiffs' applications or the defendants' decisions.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, objections to this report and

recommendation are due by September 12, 2002. Responses to objections are due by September 23, 2002.

Dated: August 27, 2002

/s/ Francis X. Caiazza
Chief U.S. Magistrate Judge

cc: United States District Court Judge Donald J. Lee

Blaine A. Lucas, Esq.
Springer, Bush & Perry
Two Gateway Center, 15th Floor
Pittsburgh, PA 15222

Scott G. Dunlop, Esq.
Paul D. Krepps, Esq.
Marshall, Dennenhey, Warner, Coleman & Goggin
USX Tower, Suite 2900
Pittsburgh, PA 15219

Mark A. Eck, Esq.
Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C.
2000 Frick Building
Pittsburgh, PA 15219

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-2476 and 05-2498

DAVID EICHENLAUB; IKE CONSTRUCTION; DANIEL EICHENLAUB; BARBARA EICHENLAUB

v.

TOWNSHIP OF INDIANA; TOWNSHIP OF INDIANA BOARD OF SUPERVISORS; DOROTHY T. CLAUS; GEORGE E. DULL, JR.; CHARLES R. FEDEROFF; JEFFREY D. PECK; DANIEL L. TAYLOR, IN THEIR OFFICIAL CAPACITIES; TOWNSHIP OF INDIANA CODE ENFORCEMENT OFFICER, JEFFREY S. CURTI, IN HIS OFFICIAL CAPACITY; DAN ANDERSON, IN HIS OFFICIAL CAPACITY; MILDRED BROZEK, ADMINISTRATIX OF THE ESTATE OF KEVIN BROZEK; TOWNSHIP OF INDIANA ENGINEER, DANIEL B. SLAGLE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY (DC Civil No. 99-cv-01607)

DANIEL EICHENLAUB; BARBARA EICHENLAUB, HIS WIFE; DAVID EICHENLAUB

v.

TOWNSHIP OF INDIANA; TOWNSHIP OF INDIANA BOARD OF SUPERVISORS; DOROTHY T. CLAUS; GEORGE E. DULL, JR.; CHARLES R. FEDEROFF; JEFFREY D. PECK; DANIEL L. TAYLOR, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; TOWNSHIP OF INDIANA CODE ENFORCEMENT OFFICER, JEFFREY S. CURTI, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; TOWNSHIP OF INDIANA MANAGER, KEVIN M. BROZEK, IN HIS

INDIVIDUAL AND OFFICIAL CAPACITY; TOWNSHIP OF INDIANA ENGINEER, DANIEL B. SLAGLE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY (DC CIVIL NO. 99-CV-01667)

TOWNSHIP OF INDIANA, JEFFREY D. PECK, IN HIS INDIVIDUAL CAPACITY, INDIANA TOWNSHIP BOARD OF SUPERVISORS AND JEFFREY S. CURTI, IN HIS OFFICIAL CAPACITY, APPELLANTS IN DOCKET NO. 05-2476

DAVID EICHENLAUB, AND DANIEL AND BARBARA EICHENLAUB, APPELLANTS IN DOCKET NO. 05-2498

Filed: Feb. 23, 2007

Before SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and COWEN, Circuit Judges.[1]

---

[1] The vote of the Honorable Robert E. Cowen, Senior United States Circuit Judge, is limited to panel rehearing.

SUR PETITION FOR REHEARING

SMITH, Circuit Judge:

The petition for rehearing filed by Appellees/Cross-Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Cowen would grant rehearing by the court en banc for the reasons set forth in his dissent.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: February 23, 2007

DMM/cc: Kimberly A. Boyer, Esq.
Charles W. Craven, Esq.
Jeffrey Cohen, Esq.
Blaine A. Lucas, Esq.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 15, 2007

Ms. Catherine E. Stetson
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: David Eichenlaub, et al.
v. Township of Indiana, Pennsylvania, et al.
Application No. 06A1065

Dear Ms. Stetson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on May 15, 2007 extended the time to and including June 25, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/_____

Melissa Blalock
Case Analyst

Supreme Court, U.S.
FILED
JUL 20 2007
OFFICE OF THE CLERK

(6)

(2)

No. 06-1709

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EICHENLAUB, et al.,
Petitioners,

v.

TOWNSHIP OF INDIANA,
Respondents,

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION
(FOR RESPONDENTS OTHER THAN CLAUS)

CHARLES W. CRAVEN
MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
1845 Walnut Street
Philadelphia, PA 19103
(215) 575-2626
Counsel of Record for Respondents
(Other than Dorothy Claus)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
COUNTERSTATEMENT OF THE CASE 2
REASONS FOR DENYING THE PETITION 3
I. THE PETITION WAS FILED TOO LATE 3
II. PETITIONERS CONCEDED THE APPLICATION OF THE *LEWIS* STANDARD 4
III. THE PETITION DOES NOT CHALLENGE THE APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS* 7
IV. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S "IMPROPER MOTIVE" STANDARD OR ITS CIRCUIT CENSUS 8
V. USE OF THE "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THE COURT'S SUBSTANTIVE-DUE-PROCESS CASES 18
CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Albright v. Oliver, 510 U.S. 266 (1994) 17

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)..... 17

Armstrong v. Squadrito, 152 F.3d 564 (7th Cir. 1998)..... 15

Banks v. City of Whitehall, 344 F.3d 550 (6th Cir. 2003)..... 14

Bonebrake v. Norris, 417 F.3d 938 (8th Cir. 2005)..... 16

Brody v. City of Mason, 250 F.3d 432 (6th Cir. 2001), ... 14

Burton v. Richmond, 370 F.3d 723 (8th Cir. 2005) 16

Chavez v. Martinez, 538 U.S. 760 (2003)..... 7

Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992)..... 16

Christensen v. County of Boone, 483 F.3d 454 (2007)..... 15

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) 1, 7

Clubside, Inc. v. Valentin, 468 F.3d 144 (2nd Cir. 2006)..... 10

Collins v. Harker Heights, 503 U.S. 115 (1992) 8

Conroe Creosoting Co. v. Montgomery County Texas, 249 F.3d 337 (5th Cir. 2001) 13

County of Sacramento v. Lewis, 523 U.S. 833 (1998).. passim

Crowley v. Courville, 76 F.3d 47 (2nd Cir. 1996) 10

Davis v. Rennie, 264 F.3d 86 (1st Cir. 2001)..... 9

Dunn v. Fairfield Community High School District No. 225, 158 F.3d 962, (7th Cir. 1998) 15

Eichenlaub v. Township of Indiana, 385 F.3d 274 (3rd Cir. 2004) ..... passim

Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) 16

Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001)..... 17, 18

Galdikas v. Fagan, 342 F.3d 684 (7th Cir. 2003)..... 15

Graham v. Connor, 490 U.S. 386 (1989) 17

Harlen Assocs. v. Incorporated Village of Mineola, 273 F.3d 494 (2nd Cir. 2001)..... 10

Hart v. City of Little Rock, 432 F.3d 801 (8th Cir. 2005)..... 16

Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999) 11

Hibbs v. Winn, 542 U.S. 88 (2004)..... 3

Iowa Coal Mining Co. v. Monroe County, 257 F.3d 846 (2001)..... 16

Kennedy v. City of Ridgefield, 439 F.3d 86 (9th Cir. 2006), rehearing den., 440 F.3d 1091 (9th Cir. 2006)..... 16

Khan v. Gallitano, 180 F.3d 829 (7th Cir. 1999)..... 14

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006) 16

Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12 (2nd Cir. 1999) 11

Madison v. Graham, 316 F.3d 867 (9th Cir. 2002) 17

Mercer v. Theriot, 377 U.S. 152 (1964) 3

Missouri v. Jenkins, 495 U.S. 33 (1990)..... 3

Mongeau v. City of Marlborough, -- F.3d -- (1st Cir. 2007) (No. 06-2666) (2007 U.S. App. LEXIS 14812; June 22, 2007) 9, 10

Montgomery v. Stefaniak, 410 F.3d 933 (7th Cir. 2005) 15

Moran v. Burbine, 475 U.S. 412 (1986)..... 7

Morris v. Dearborne, 181 F.3d 657 (5th Cir. 1999)..... 13

Natale v. Town of Ridgefield, 170 F.3d 258 (2nd Cir. 1999) 11

Nestor Colon Medina & Sucesores, Inc. v. *Custodio*, 964 F.2d 32 (1st Cir. 1992)..... 9

O'Connor v. Pierson, 426 F.3d 187 (2nd Cir. 2005)..... 11

O'Mara v. Township of Wappinger, 485 F.3d 693 (2nd Cir. 2007)..... 10

Pagan v. *Calderon*, 448 F.3d 16 (1st Cir. 2006)..... 9

PFZ Properties, Inc. v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991)..... 10

Reese v. Georgia, 350 U.S. 85 (1955)..... 4

Russo v. City of Bridgeport, 479 F.3d 196 (2nd Cir. 2007).. 11

Schroder v. City of Fort Thomas, 412 F.3d 724 (6th Cir. 2005)..... 14

SFW Arecibo, Ltd. v. *Rodriguez*, 415 F.3d 135 (1st Cir. 2005)..... 9

Simi Investment Co. Inc. v. Harris County Texas, 236 F.3d 240 (5th Cir. 2000)..... 13

Singleton v. Cecil, 176 F.3d 419 (8th Cir. 1999)..... 16

Sochor v. Florida, 504 U.S. 527 (1992)..... 4

Squaw Valley Development Co. v. Goldberg, 375 F.3d 936 (9th Cir. 2004)..... 17

United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3rd Cir. 2003).... 1, 2, 5, 18

Urie v. Thompson, 337 U.S. 163 (1949)..... 4

WMX Tech., Inc. v. Gasconade County, 105 F.3d 1195 (8th Cir. 1997)..... 16

Young v. City of Mt. Ranier, 238 F.3d 567 (4th Cir. 2001).. 12

Rules

Supreme Court Rule 15.2..... 2

Treatises

Stern's *Supreme Court Practice*..... 4

INTRODUCTION

Respondents (other than Dorothy T. Claus, who has her own attorney) respectfully ask this Honorable Court to deny the Eichenlaubs' certiorari petition for five independently compelling reasons.

First, the petition was filed far too late to allow certiorari review of the Court of Appeals' September 21, 2004 confirmation that petitioners' substantive due process claim was no longer viable. *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285-286 (3rd Cir. 2004); App. 16a-19a.

Second, petitioners waived the issue raised by their petition, because they admitted, without qualification or reservation, in both the District Court and the Court of Appeals, that their substantive due process claim was controlled by the "shocks the conscience" standard enunciated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and applied to land-use cases by *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003).

Third, the petition does not challenge or offer a valid reason to overrule this Court's application of *Lewis* to a land use case in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198-199 (2003).

Fourth, current case law provides no support for petitioners' "improper motive" test, and refutes their specter of an "exacerbate[d]," "entrenched," "intractable," "intensified," "deep," "seven-to-four" conflict among the circuits, confusion among the lower courts, and a "glaring lack of uniformity throughout the Nation" (Pet. 13, 16, 17, 27).

Fifth, the Court of Appeals' application of *Lewis* to substantive due process claims in land-use cases does not conflict with, but rather implements this Court's precedents.

COUNTERSTATEMENT OF THE CASE

Because the petition seeks review of the nearly three-year old final order which confirmed the elimination of the petitioners' substantive due process claim in *Eichenlaub I* (Pet. 11), for purposes of Supreme Court Rule 15.2, respondents incorporate by reference the more balanced and appropriate statement of the case presented in that opinion, 385 F.3d at 277-279 (App. 2a-6a). The petition persistently obscures, but the Court of Appeals appreciated, that the dispute between petitioners and respondents stems from a difference of opinion about the applicability of land-use regulations which came into existence during the many years before petitioners decided to improve their properties. *Id.* at 276-277 (App. 2a).

In addition, as discussed more fully below, petitioners admitted, without qualification or reservation, in both the District Court and the Court of Appeals, that the application of *Lewis* to substantive due process claims in land-use cases by *United Artists* controlled this case. *See*, Petitioners' "Supplemental Brief in Opposition to Defendants' Motions for Summary Judgment," p. 1-3, 8-11; petitioners' Brief of Appellants, p. 30-31, 33-41; petitioners' Reply Brief, p. 12-16; *Eichenlaub I*, *supra*, 385 F.3d at 285 (App. 16a) ("The District Court properly held, and **the Eichenlaubs do not dispute, that whether a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test.**") (emphasis added).

The petition weaves First Amendment retaliation throughout its statement of the petitioners' case (Pet. 4, 5, 7), but only David Eichenlaub asserted a First Amendment retaliation claim. *Eichenlaub I*, *supra*, 385 F.3d at 277, 278 (App. 2a, 4a-5a). Moreover, the jury's award on that claim and the District Court's awards of trial and appellate attorneys fees to the Eichenlaubs have been paid in full. The petition does not delineate what separate damages, if any, might attach to petitioners' substantive due process claim.

REASONS FOR DENYING THE PETITION

I. THE PETITION WAS FILED TOO LATE

The petition, filed on June 25, 2007, should be denied, because it was filed nearly three years too late to allow this Court to review the Court of Appeals' decision in *Eichenlaub I*, which was final and reviewable on September 21, 2004.

To be timely, a certiorari petition must be filed in a civil case such as this within 90 days of the date of the judgment on which review is sought. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional."). *See also*, *Hibbs v. Winn*, 542 U.S. 88, 97 (2004) ("Section 2101(c) instructs that a petition for certiorari must be filed 'within ninety days after the entry of . . . judgment.'").

Although a "timely rehearing petition, a court's appropriate decision to entertain an untimely rehearing petition, and a court's direction, on its own initiative, that the parties address whether rehearing should be ordered" might postpone the finality of a Court of Appeals' decision, *Hibbs*, *supra*, 542 U.S. at 98, none of those factors is involved in this case.

Using *Mercer v. Theriot*, 377 U.S. 152 (1964), as its principal support, the petition asserts that the above analysis is "exactly wrong," because "[i]t is hornbook law that this Court may grant certiorari from a second appellate decision in a given case and may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal." (Pet. 12-13 n. 2; internal quotation marks omitted.) As far as it goes, that principle is incontestable, but it does not encompass this case.

Mercer involved the grant of a new trial in the first appeal which kept the issue alive on remand, and thus presented an interlocutory decision from which a petition for a writ of

certiorari could not be filed. That is also the procedural situation contemplated by the petitioners' excised quote from Stern's *Supreme Court Practice*, and it is the same situation encountered in *Reese v. Georgia*, 350 U.S. 85 (1955) (first appeal vacated judgment and remanded for new trial).

But, the procedural posture of this case is far different, because the petitioners' substantive due process claim did not survive summary judgment in the District Court and its demise was confirmed in *Eichenlaub I*.

The procedural posture of this case also differs greatly from that in *Urie v. Thompson*, 337 U.S. 163, 171-172 (1949), where this Court could not review the first decision of the state court, because it remanded for a trial, not for dismissal, and its initial decision was interlocutory. It was only after the second state court appeal that the appellant had the first opportunity to invoke the Court's jurisdiction. *Id.*, 337 U.S. at 173 n. 12 (appellant "invoked the jurisdiction of this court at the first opportunity open to [him]").

In contrast, petitioners' first opportunity to contest the Court of Appeals' decision in *Eichenlaub I* came and went nearly three years before they filed their petition, when the Court of Appeals affirmed that petitioners' substantive due process claim was no longer part of this case. As such, the petition is too late to trigger this Court's certiorari jurisdiction and should be denied.

II. PETITIONERS CONCEDED THE APPLICATION OF THE *LEWIS* STANDARD

This Court lacks jurisdiction to decide issues which petitioners have not preserved in the lower courts. *See, e.g.*, *Sochor v. Florida*, 504 U.S. 527, 533-534 (1992) (Court lacks jurisdiction to decide issue not preserved). Consequently, the petition in this case should be denied, because it seeks to challenge the use of a standard which the petitioners not only failed to contest when they had the opportunity to do so years ago, but whose application they

conceded in both the District Court and in the Court of Appeals, without qualification or reservation. *Eichenlaub I*, *supra*, 385 F.3d at 285 (App. 16a) ("The District Court properly held, and **the Eichenlaubs do not dispute, that whether a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test.**") (emphasis added).

Footnote 1 at pages 11-12 of the petition struggles to dispel the obvious conclusion that the petitioners failed to preserve their contention that the Court of Appeals applied the wrong standard and that the defunct and discredited "improper motive" test should by resurrected and applied by this Court to substantive due process claims in land-use cases. The footnote rationalizes that, because a panel of the Third Circuit usually does not disregard a prior panel's decision, petitioners "were under no obligation to do anything more than" to note in their appellate briefs that "they had at all times advocated for the 'improper motive' standard ... but then argue the appeal under the controlling standard in the Third Circuit." (Pet. 12, n. 1.)

However, the petition does not explain why petitioners could not and did not raise essentially the same arguments which they raise in their petition in order to seek an *en banc* hearing of their appeal or, at the very least, to pave the way for their petition's arguments.

Moreover, petitioners did not consistently advocate application of the "improper motive" standard, and they were not ambushed by *United Artists* "by the time they filed their appellate briefs." (Pet. 13, n. 1.)

To the contrary, before considering the parties' respective exceptions to the Magistrate Judge's report and recommendation, the District Court allowed the parties to file supplemental briefs concerning the applicability of *United Artists*. (App. 36a.) At that time, petitioners abandoned the "improper motive" standard and embraced the "shocks the conscience" standard without reservation or condition. *See*,

petitioners' "Supplemental Brief in Opposition to Defendants' Motions for Summary Judgment," p. 1-3, 8-11 (anticipating that defendants would rely on *United Artists*; admitting that the Third Circuit "[i]ndisputably" overruled use of the "improper motive" test and adopted the *Lewis* "shocks the conscience" standard in *United Artists*; asserting that petitioners' evidence satisfied the *Lewis* standard; and, contending that the defendants conduct was similar to the conduct of municipal defendants found in other cases to have been "arbitrary and capricious and to 'shock the conscience.'").

Petitioners' abandonment of the "improper motive" standard and their unconditional acceptance of the "shocks the conscience" standard extended into their appeal in *Eichenlaub I*. Petitioners' Brief of Appellants (p. 30-31, 33-41) admitted adoption of the "shocks the conscience" standard in *United Artists*, but asserted that respondents' conduct "shocks the conscience." Furthermore, petitioners' Reply Brief (p. 12-16; emphasis added) stated, "**All parties to this appeal agree that this Circuit's holding in *United Artists Theatre Circuit, Inc. v. Twp of Warrington*, 316 F.3d 392, *reh'g den.*, 324 F.3d 113 (3d Cir. 200[3]) requires that a 'shocks the conscience' analysis be applied,**" and then argued that summary judgment for respondents under that standard was error.

After unequivocally and repeatedly telling both the District Court and the Court of Appeals that the "shocks the conscience standard," rather than the "improper motive" standard, controlled their substantive due process claim, petitioners cannot and should not be heard to claim the opposite to this Court. Consequently, because petitioners failed to preserve the issue that the Court of Appeals applied the wrong standard, the petition should be denied.

III. THE PETITION DOES NOT CHALLENGE THE APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS*

The petition argues that *Lewis* had no intended impact beyond high-speed police chases and prison riots (Pet., p. 23-25), and it asserts categorically that "[t]here are good reasons why this Court has never extended 'shocks the conscience' beyond its original police-and-prisons context," meaning high-speed chases and prison riots. (*Id.*, p. 25.)

However, the petition fails to acknowledge that this Court unhesitatingly applied *Lewis* to a land-use matter in *Cuyahoga Falls*, *supra*, 538 U.S. at 198-199 ("We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'").").

Furthermore, the petition ignores the Court's application of the *Lewis* standard beyond the narrow scope of high-speed police chases and prison riots to the interrogation of a witness in a hospital in *Chavez v. Martinez*, 538 U.S. 760, 774 (2003), and to alleged police deception of an arrestee in *Moran v. Burbine*, 475 U.S. 412, 432-433 (1986).

Moreover, the petition's arguments fail to appreciate that the *Lewis* standard equates "shocks the conscience" with "most egregious" and "arbitrary in the constitutional sense," and uses those terms interchangeably. In addition to the above quote from *Cuyahoga Falls*, the Court's opinion in *Lewis* expressly draws that that equation. In that opinion, the Court observed that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in

the constitutional sense.'" *Lewis*, *supra*, 523 U.S. at 845-846 (citation omitted). After noting its long history of speaking of "the cognizable level of executive abuse of power as that which shocks the conscience," the Court noted that, in *Collins* v. *Harker Heights*, 503 U.S. 115, 128 (1992), it "said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Lewis*, *supra*, 523 U.S. at 846, 847.

Likewise, footnote 7 at page 23 of the petition ignores those dimensions of the *Lewis* standard to mistakenly downplay the significance of the Court's holding in *Collins*, an employee safety claim, in which the Court held, "We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as **arbitrary, or conscience shocking, in a constitutional sense**." (Emphasis added.) *Collins*, *supra*, 503 U.S. at 128.

The petition should be denied, because it does not challenge the foregoing applications of the *Lewis* standard.

IV. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S "IMPROPER MOTIVE" STANDARD OR ITS CIRCUIT CENSUS

Significantly, the petition does not cite -- and respondents' independent research has not found -- any currently authoritative federal appellate court decision which supports the use of petitioners' defunct "improper motive" test.

Moreover, current case law refutes petitioners' specter of an "exacerbate[d]," "entrenched," "intractable," "intensified," "deep," "seven-to-four" conflict among the circuits, confusion among the lower courts, and a "glaring lack of uniformity throughout the Nation" (Pet., p. 13, 16, 17, 27).

As the following circuit review demonstrates, the petition's census must be completely realigned, and that realignment reveals no need for intervention by this Court.

FIRST CIRCUIT. To position the First Circuit, the petition first relies on *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001), a case which focused on jury instructions concerning the failure of mental health workers to stop the beating of a restrained, involuntarily committed patient. Those instructions employed the "deliberate indifference" standard, telling the jury, in sum, to "determine as to each defendant whether he or she actually knew of Mr. Bragg's alleged punching, whether he or she could have prevented it, whether there was enough time to do so, and whether he or she failed to do so." *Davis*, 264 F.3d at 97. The District Court declined to add the requirement that the jury also find that the defendant's conduct "shocked the conscience," and the First Circuit affirmed. *Id.*, at 99-100. That decision, however, is fully consistent with *Lewis*, because, as noted in *Lewis*, deliberate indifference alone is "enough to satisfy the fault requirement for due process claims" based on the analogous situation involving the medical needs of someone jailed while awaiting trial. *Lewis, supra*, 523 U.S. at 850.

After incorrectly construing *Davis*, the petition flatly declares that "[t]he First Circuit also declines to apply *Lewis* in land-use cases; it instead regularly has applied a disjunctive test that mentions the *Lewis* standard but can be met without conscience-shocking behavior." (Pet., p. 18, n. 3.) However, in *Mongeau v. City of Marlborough*, -- F.3d -- (1st Cir. 2007) (No. 06-2666) (2007 U.S. App. LEXIS 14812; June 22, 2007) , a land-use case, the First Circuit reconfirmed that "a plaintiff may prevail on a substantive due process claim only if the defendant has engaged in behavior that 'shocks the conscience,'" citing *Pagan* v. *Calderon*, 448 F.3d 16, 32 (1st Cir. 2006); *SFW Arecibo, Ltd.* v. *Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005); *Nestor Colon Medina & Sucesores, Inc.* v. *Custodio*, 964 F.2d 32, 45 (1st Cir. 1992)

(quoting *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)).

In addition, *Mongeau* noted that the First Circuit has "stated with 'a regularity bordering on the monotonous' that to be liable for a violation of substantive due process rights, a defendant must have engaged in behavior that is 'conscience-shocking,'" and that the court has "repeatedly affirmed the use of this standard in the context of challenges to land use decisions." *Mongeau*, -- F.3d at -- (2007 U.S. App. LEXIS 14812, p. 7). Furthermore, the court confirmed the breadth of its application of the *Lewis* standard by stating that its "precedent on this issue is both clear and binding on this case: in order to state a substantive due process claim of any ilk, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience." *Id.*

Given the above, the First Circuit must be realigned with the Third, Tenth, Eleventh and D.C. Circuits.

SECOND CIRCUIT. The petition asserts that the Second Circuit applies "an entirely different standard," under which the court first determines whether the claimant has a valid property interest in the permit or certificate, and then whether the executive acted in an "arbitrary or irrational manner." (Pet., p. 17, citing *O'Mara v. Township of Wappinger*, 485 F.3d 693, 152 (2nd Cir. 2007), *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2nd Cir. 2006), and *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494 (2nd Cir. 2001). In each of those cases, however, the appellate court ruled in favor of the executive and dismissed the plaintiff's substantive due process claim on the ground that the plaintiff lacked a valid property interest. None of those cases cited, let alone considered, *Lewis*. Moreover, arbitrary or irrational executive action in the land use context obtains "only when government acts with 'no legitimate reason for its decision.'" *Crowley v. Courville*, 76 F.3d 47, 52 (2nd Cir. 1996). As noted above, that standard is hardly "entirely different" from

the "shocks the conscience" standard.

Furthermore, in *O'Connor v. Pierson*, 426 F.3d 187, 203 (2nd Cir. 2005), cited at page 17 of the petition, the Second Circuit squarely recognized that *Lewis* "set the bar higher for challenges to executive action," and that "'only the most egregious official conduct,' conduct that 'shocks the conscience,' will subject the government to liability for a substantive due process violation based on executive action." The court also recognized that *Lewis* swept broadly beyond prison riots and high-speed police chases. *O'Connor*, 426 F.3d at 204 (*Lewis* "did not distinguish between different types of substantive due process claims, so 'constitutionally arbitrary' action for purposes of a property-based substantive due process claim is action that shocks the conscience.").

In addition, less than 10 months after *Lewis* was filed, the Second Circuit quickly applied the "shocks the conscience test" to a land use claim and underscored the limited role that substantive due process and the federal courts had in state land use cases in *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-263 (2nd Cir. 1999). The court applied the standard to another land-use case in *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2nd Cir. 1999). More recently, the court applied the standard to a Fourth Amendment type claim in *Russo v. City of Bridgeport*, 479 F.3d 196, 209-210 (2nd Cir. 2007).

Given the above, the Second Circuit must be realigned with the First, Third, Tenth, Eleventh and D.C. Circuits.

FOURTH CIRCUIT. The Fourth Circuit must also be realigned to join the First, Second, Third, Tenth, Eleventh and D.C. Circuits.

Shortly after *Lewis* was filed, the Fourth Circuit recognized in *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) that "Courts now considering any claim of substantive due process violation must look for principal guidance to" *Lewis* and to *Glucksberg*, and that, under *Lewis*,

"the issue of fatal arbitrariness should be addressed as a 'threshold question,' asking whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" Two years later, in *Young v. City of Mt. Ranier*, 238 F.3d 567, 574 (4th Cir. 2001), the court noted the continued broad applicability of the *Lewis* standard stating, "Broadly speaking, the substantive due process provision of the Fourteenth Amendment protects against egregious, arbitrary governmental conduct. See *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). Only governmental conduct that "shocks the conscience" is actionable as a violation of the Fourteenth Amendment." More recently, in *United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004), the court reconfirmed that "[a]n executive act can violate substantive due process only when the act shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)."

The tripartite test partially quoted by the petition from *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), does not represent a departure from the high standard set by Lewis. That test requires a property claimant to "demonstrate: '(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.'" *Id.* at 440 (citation omitted). The test was formulated, because "[s]ubstantive due process protections 'run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'" *Id.* (citation omitted). That formulation hardly undermines *Lewis*.

FIFTH CIRCUIT. The Fifth Circuit has not repudiated its decision rendered shortly after *Lewis* in *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999). In *Morris*, which involved a teacher's fabrication of sexual abuse against a student's father, the court recognized and applied the "shocks the conscience" standard, and alternatively expressed that standard as conduct "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" or as "abusive, irrational or malicious abuse of government power that shocks the conscience."

The petition relies on *Simi Investment Co. Inc. v. Harris County Texas*, 236 F.3d 240 (5th Cir. 2000), to position the Fifth Circuit. Yet, that case does not deviate from *Lewis*, because the Court of Appeals recognized "that reliance on substantive due process must be taken with the 'utmost care,'" and it expressly limited its "holding to the type of blatant governmental interference with property rights that is now before us." *Id.* at 249.

Moreover, the petition ignores *Conroe Creosoting Co. v. Montgomery County Texas*, 249 F.3d 337 (5th Cir. 2001), a case relied on heavily by petitioners at pages 38-41 of their Third Circuit Brief of Appellants. In that case, a land-use dispute, the Fifth Circuit explicitly noted that "Courts generally examine due process challenges to executive action by asking 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id.* at 341 (citation omitted).

Consequently, the Fifth Circuit must be placed with the First, Second, Third, Fourth, Tenth, Eleventh and D.C. Circuits.

SIXTH CIRCUIT. The petition's circuit census must also be corrected to include the Sixth Circuit with the First, Second, Third, Fourth, Fifth, Tenth, Eleventh and D.C. Circuits.

Brody v. City of Mason, 250 F.3d 432 (6th Cir. 2001), cited at page 18 of the petition stated that, in a land-use case, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the ... [administrative] decision,'" and recognized that "[t]his requires a very strong showing. 'The administrative action will withstand substantive due process attack unless it "'is not supportable on any rational basis'" or is "'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.'" *Id.* at 438 (citations omitted). But, as noted above with respect to other "strict sense" or "constitutional sense" cases, that standard does not differ from the *Lewis* standard.

Moreover, two more recent cases underscore that the Sixth Circuit follows the *Lewis* standard. In *Banks v. City of Whitehall*, 344 F.3d 550, 554-555 (6th Cir. 2003) (citations omitted), a land-use case, the court rejected a substantive due process claim, because "the conduct of Whitehall officials in enforcing those codes and regulations was neither 'arbitrary' nor 'conscience-shocking' in the constitutional sense." Likewise, in *Schroder v. City of Fort Thomas*, 412 F.3d 724, 730-731 (6th Cir. 2005), the court explained that "our cases stress that, where a plaintiff claims that a non-custodial substantive due process violation has occurred because of the government's deliberate indifference, something more must be shown--a something that we have variously described as 'callous[] disregard [for] the risk of injury,' or action 'in an arbitrary manner that "shocks the conscience" or that indicates an[] intent to injure.'"

SEVENTH CIRCUIT. Like the First, Second, Fourth, Fifth, and Sixth Circuits, the Seventh Circuit must also be realigned with the Third, Tenth, Eleventh and D.C. Circuits.

The petition bases its placement of the Seventh Circuit on just one case, *Khan v. Gallitano*, 180 F.3d 829 (7th Cir. 1999). *Khan* does contain language which could be

interpreted to relegate *Lewis* to police chase and pre-trial detention cases, but that language is simply dicta, since the opinion concluded that "we would reach the same conclusion whether we ask [under *Lewis*] if the defendants' conduct shocks our conscience or [under *Washington v. Glucksberg*, 521 U.S. 702 (1997)] if the defendants violated a fundamental right deeply rooted in our tradition and history: Khan's claim fails." *Id.* at 836 (bracketed material added). Significantly, in *Galdikas v. Fagan*, 342 F.3d 684, 690 n.3 (7th Cir. 2003), the Seventh Circuit viewed *Kahn* and similar cases as exhibiting "a more generally perceived confusion as to the interrelationship of *Lewis* and *Glucksberg*," but not as indicia that the court rejected *Lewis* for a more liberal standard.

Moreover, the Seventh Circuit employed the *Lewis* analysis and standard before *Khan* in *Armstrong v. Squadrito*, 152 F.3d 564, 570, 576 (7th Cir. 1998), and in *Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 965-66 (7th Cir. 1998), and the court did not view *Khan* as precluding the application of *Lewis* in later substantive due process cases. *See*, *Christensen v. County of Boone*, 483 F.3d 454, 462 n. 2 (2007) ("When, as in the present case, a plaintiff complains of abusive executive action, this "conscience shocking" test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1997) (clarifying this distinction)."); *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005) (wrongful discharge claim) ("The scope of substantive due process, however, is very limited and protects plaintiffs only against arbitrary government action that "shocks the conscience.' *Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005) (internal citation and quotation omitted)").

EIGHTH CIRCUIT. Although placing the Eighth Circuit with the Third, Tenth and D.C. Circuits, the petition

mistakenly understated that support by positing an internal division in the Eighth Circuit between the "truly irrational" test and the "shocks the conscience" test. (Pet. 19.) However, *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (2001), referred by the petition as one prong of that alleged division, did not cite or consider *Lewis*, but rather rested on decisions which preceded *Lewis*, e.g., *WMX Tech., Inc. v. Gasconade County*, 105 F.3d 1195, 1199 n. 4 (8th Cir. 1997), and *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992). The other prong to the petition's assertion, *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006), actually disproves the alleged internal split, because that case draws a clear equation between the "truly irrational" test and the "shocks the conscience" test. The same equation was noted by the en banc court in *Singleton v. Cecil*, 176 F.3d 419, 425 n. 7 (8th Cir. 1999).

In addition to *Koscielski* and *Singleton*, the Eighth Circuit recognized the applicability of the *Lewis* "shocks the conscience" test in *Entergy Ark., Inc. v. Nebraska*, 241 F.3d 979, 991 (8th Cir. 2001), and in numerous other cases, including: *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. 2005), a "state created danger" case; *Bonebrake v. Norris*, 417 F.3d 938, 943 (8th Cir. 2005), a delayed incarceration case; *Neal v. Fields*, 429 F.3d 1165, 1166 (8th Cir. 2005), an employment claim; and, *Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2005), a social services placement claim.

NINTH CIRCUIT. The petition misconstrues the significance of *Kennedy v. City of Ridgefield*, 439 F.3d 86 (9th Cir. 2006), rehearing den., 440 F.3d 1091 (9th Cir. 2006). That case and the quarrel raised by the dissent from the decision to deny rehearing focused on an extension of the "state created danger" doctrine. There was no assertion that "shocks the conscience" had to be proven to establish liability under that doctrine; rather, the controversy concerned

whether the doctrine should be extended.

The petition also overlooks the tendency of the Ninth Circuit to heed this Court's admonitions in *Lewis*, *supra*, 523 U.S. at 843, in *Albright v. Oliver*, 510 U.S. 266, 272 (1994), and in *Graham v. Connor*, 490 U.S. 386 (1989), that substantive due process claims should be analyzed under specific Amendments. For example, property claims are thus treated – and largely dismissed -- under the Fifth Amendment's "taking clause." *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc); *Madison v. Graham*, 316 F.3d 867, 871 (9th Cir. 2002); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 949-950 (9th Cir. 2004) ("The parties have not cited to any post-*Armendariz* case, and our research has revealed none, where this Circuit upheld a substantive due process claim based on a deprivation of real property."). Similarly, sexual misconduct by police toward an arrestee is treated under the Fourth and the Eighth Amendments, *Fontana v. Haskin*, 262 F.3d 871, 881-882 (9th Cir. 2001).

However, *Squaw Valley* illustrates that the Ninth Circuit recognizes that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," and that "[t]he substantive component of the Due Process Clause 'forbids the government from depriving a person of life, liberty, or property in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Squaw Valley*, 375 F.3d at 948. The case also demonstrates that, even though one defendant "harbor[ed] actual 'hostility' and 'antagonism' toward" the property owner and had no factual support for his claim that the owner failed to comply with regulations, *id.* at 947, and even though the defendants subjected the owner to "selective and overzealous enforcement" and "to a tyrannical regime of regulatory abuse designed to drive the resort out of business," the owner did not have an actionable claim under the Fourteenth or the Fifth Amendments. *Id.* at 948.

Moreover, *Fontana* illustrates that the court would use the "shocks the conscience" standard under *Lewis* in a Fourteenth Amendment analysis. *Fontana*, 262 F.3d at 882 n. 7 ("Under the Fourteenth Amendment's substantive due process prong, we use the 'shocks the conscience' test. The threshold question is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'") (citations omitted).

The petition should be denied, because the case law does not support petitioners' "improper motive" standard, nor does it demonstrate a division among the circuit courts to support their call for this Court's intervention.

V. USE OF THE "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THE COURT'S SUBSTANTIVE-DUE-PROCESS CASES

The petition asserts that applying the "shocks the conscience" standard is "in direct conflict with this Court's substantive-due-process cases," and that "[t]he Third Circuit erred in concluding that *Lewis* implicitly overruled this Court's earlier precedents." (Pet., p. 21.) Neither of those propositions withstands scrutiny.

Significantly, the petition provides no citation to support its claim that the Third Circuit concluded "that *Lewis* implicitly overruled this Court's earlier precedents." The Court of Appeals did not express that view either in *United Artists*, *supra*, or in *Eichenlaub I*.

Moreover, application of the "shocks the conscience" standard follows *Lewis*, while the "improper motive" deviates from the high standard set and maintained for decades by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

CHARLES W. CRAVEN
MARSHALL, DENNEHEY,
WARNER, COLEMAN & GOGGIN
1845 Walnut Street
Philadelphia, PA 19103
Counsel for Respondents
(except Claus)
(215) 575-2626

FILED
AUG 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)
No. 06-1709

IN THE
Supreme Court of the United States

DAVID EICHENLAUB, *et al.*,
Petitioners,

v.

TOWNSHIP OF INDIANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

GERRI L. SPERLING
METZ LEWIS L.L.C.
11 Stanwix Street
18th Floor
Pittsburgh, PA 15222
(412) 918-1165

*Counsel of Record

CATHERINE E. STETSON
CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE CIRCUIT SPLIT IS REAL AND SUBSTANTIAL 1

II. THE TOWNSHIP'S ARGUMENTS ABOUT SUPREME COURT PRECEDENT AND PROCEDURE ARE MISTAKEN 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

Albright v. *Oliver*, 510 U.S. 266 (1994) 7

Armstrong v. *Squadrito*, 152 F.3d 564 (7th Cir. 1998) 6

Banks v. *City of Whitehall*, 344 F.3d 550 (6th Cir. 2003) 4

Brody v. *City of Mason*, 250 F.3d 432 (6th Cir. 2001) 2, 3, 4

Chavez v. *Martinez*, 538 U.S. 760 (2003) 8

City of Cuyahoga Falls v. *Buckeye Community Hope Found.*, 538 U.S. 188 (2003) 8

Conroe Creosoting Co. v. *Montgomery County*, 249 F.3d 337 (5th Cir. 2001) 5

County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 2

Crowley v. *Courville*, 76 F.3d 47 (2d Cir. 1996) 2

Doe v. *Chao*, 540 U.S. 614 (2004) 2

Galdikas v. *Fagan*, 342 F.3d 684 (7th Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004) 5, 6

Kennedy v. *City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) 3, 6, 7

Kennedy v. *City of Ridgefield*, 440 F.3d 1091 (9th Cir. 2006) (en banc) 7

TABLE OF AUTHORITIES—Continued

Page

Khan v. *Gallitano*, 180 F.3d 829 (7th Cir. 1999) 5, 6

L.W. v. *Grubbs*, 92 F.3d 894 (9th Cir. 1996) 6

Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 9

Mercer v. *Theriot*, 377 U.S. 152 (1964) 9

Mongeau v. *City of Marlborough*, — F.3d —, 2007 WL 1793137 (1st Cir. June 22, 2007) 7

Morris v. *Dearborne*, 181 F.3d 657 (5th Cir. 1999) 4

Natale v. *Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999) 4

O'Connor v. *Pierson*, 426 F.3d 187 (2d Cir. 2005) 4

O'Mara v. *Town of Wappinger*, 485 F.3d 693 (2d Cir. 2007) 2, 3, 4

Scarborough v. *United States*, 431 U.S. 563 (1977) 5

Simi Inv. Co. v. *Harris County*, 236 F.3d 240 (5th Cir. 2000) 2

Sunrise Corp. of Myrtle Beach v. *City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) 4

Tri-County Paving, Inc. v. *Ashe County*, 281 F.3d 430 (4th Cir. 2002) 2, 3

TABLE OF AUTHORITIES—Continued

Page

United Artists Theatre Circuit, Inc. v. *Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) 3, 9, 10

United States v. *Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004) 4

United States v. *Williams*, 504 U.S. 36 (1992) 9, 10

Warren v. *City of Athens*, 411 F.3d 697 (6th Cir. 2005) 4

Rule:

S. Ct. Rule 10(b) 3

Other Authority:

Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002) 9

IN THE

Supreme Court of the United States

No. 06-1709

DAVID EICHENLAUB, *et al.*,

Petitioners,

v.

TOWNSHIP OF INDIANA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

I. THE CIRCUIT SPLIT IS REAL AND SUBSTANTIAL.

1. Respondents are wrong to suggest that the entrenched circuit split identified by the petition is no split at all. The Township attempts to "realign" four courts of appeals—the Second, Fourth, Fifth, and Sixth Circuits—by insisting that they use a standard identical to "shocks the conscience," even though they use entirely different words and concepts. Thus the Township asserts (Opp. 10) that the Second Circuit should be "realigned" with the Third, even though the Second Circuit has asked not whether an executive action "shocks the conscience" but whether it is "arbitrary or irrational" in the sense that there is no "legitimate reason" for

it. *O'Mara* v. *Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *Crowley* v. *Courville*, 76 F.3d 47, 52 (2d Cir. 1996). The Township likewise insists (Opp. 12) that the Fourth Circuit's test is indistinguishable from "shocks the conscience," even though the Fourth Circuit inquires whether action was "so arbitrary and irrational * * * as to be literally incapable of avoidance by any pre-deprivation procedural protections." *Tri-County Paving, Inc.* v. *Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002). The Township acknowledges that the Fifth Circuit has used a rational-basis test—but maintains that is no different from "shocks the conscience" because the court "recognized 'that reliance on substantive due process must be taken with the utmost care.'" Opp. 13 (quoting *Simi Inv. Co.* v. *Harris County*, 236 F.3d 240, 249 (5th Cir. 2000)). And the Township acknowledges (Opp. 14) that the Sixth Circuit has asked not whether executive action "shocks the conscience," but instead whether it is "willful and unreasoning * * *, without consideration and in disregard of the facts and circumstances of the case." *Brody* v. *City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001). No matter, says the Township: "that standard does not differ" from the test enunciated in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998).

But words have meaning, and different words carry different meanings. When courts use entirely "different words" like "legitimate reason" instead of "shocks the conscience" to measure a substantive-due-process claim, they are presumably not "equat[ing] the two phrases." *Doe* v. *Chao*, 540 U.S. 614, 630 (2004). Indeed, apart from its own say-so, the Township offers no reason to believe that the Second, Fourth, Fifth, and Sixth Circuits intended their carefully calibrated—and markedly different—standards to be mere synonyms for a precise term of art like "shocks the conscience."

And in fact those tests cannot be reconciled with "shocks the conscience." After all, the "shocks the conscience" formulation imports subjectivity into the substantive-due-

process inquiry that is not present in formulations like the rational-basis test. *See Kennedy* v. *City of Ridgefield*, 439 F.3d 1055, 1064-65 (9th Cir. 2006) (calling "shocks the conscience" a "subjective epithet[ ]"); *see also Lewis*, 523 U.S. at 857-858 (Kennedy, J., concurring) ("The phrase has the unfortunate connotation of a standard laden with subjective assessments"). Moreover, many of the above-quoted tests may be met by an executive action that—although irrational and arbitrary—may not be so outrageous as to shock the judicial conscience. A government action may be "so arbitrary and irrational * * * as to be literally incapable of avoidance by any pre-deprivation procedural protections," *Tri-County Paving*, 281 F.3d at 440, and yet may involve an issue too mundane to shock the conscience. And judges might agree that a government action is "willful and unreasoning," *Brody*, 250 F.3d at 438, without considering their consciences shocked.[1] For these reasons, the Township's attempt to discount cases like *O'Mara*, *Tri-County Paving*, *Simi Investment*, and *Brody* must fail. Each has contributed to a split in authority that justifies this Court's intervention.[2]

2. The Township takes another tack in explaining why this conflict is not really a conflict: It notes that in each of the circuits, at least one panel has spoken broadly about applying

---

[1] Indeed, the notion that different substantive-due-process tests lead to different outcomes was at the heart of *United Artists*. The majority wrote that the "improper motive" test conflicted with "shocks the conscience" because "[i]n ordinary parlance, the term 'improper' sweeps much more broadly, and [prior case law n]ever suggested that conduct could be 'improper' only if it shocked the conscience." *United Artists Theatre Circuit, Inc.* v. *Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).

[2] Furthermore, the Township does not even dispute the existence of a split among the State courts of last resort. *See* Pet. 20-21 & n.6. This division of authority is enough standing alone to warrant a grant of certiorari. *See* S. Ct. Rule 10(b).

the "shocks the conscience" test to all executive action. Opp. 11-14 (citing *O'Connor* v. *Pierson*, 426 F.3d 187 (2d Cir. 2005); *United States* v. *Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004); *Morris* v. *Dearborne*, 181 F.3d 657 (5th Cir. 1999)). But this only highlights the confusion and conflict among the federal courts of appeals. As we explained in the petition, each of these four circuits (i) has applied "shocks the conscience" in some substantive-due-process cases, (ii) has spoken in dicta about applying "shocks the conscience" across the board, but (iii) *has nevertheless continued to apply other tests in certain fact settings*. *See* Pet. 17-20. Thus, the Fourth Circuit declined to apply "'shocks the conscience" in *Sunrise Corp. of Myrtle Beach* v. *City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005), even though it was decided a year after the case (*Al-Hamdi*) that the Township says established across-the-board application of the test in that circuit. And the Second Circuit declined to apply "shocks the conscience" in *O'Mara*, even though it was decided two years after the case (*O'Connor*) that the Township says established across-the-board application of the test in that circuit.[3] These decisions beg the very question presented by the petition: "[w]hether * * * all substantive-due-process claims involving executive action are subject to the 'shocks the conscience' standard, or whether * * * only certain types of executive action are subject to that standard." Pet. i. To the extent the cases cited by the Township suggest *intra*-circuit divisions,

---

[3] *O'Mara* and the host of other Second Circuit land-use cases that decline to employ the "shocks the conscience" test undercut the Township's reliance on *Natale* v. *Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999), a land-use decision that appears to use "shocks the conscience" but predates the *O'Mara* line. *See* Pet. 17 (citing *O'Mara* and other post-1999 cases). Likewise, the Township's reliance on *Banks* v. *City of Whitehall*, 344 F.3d 550 (6th Cir. 2003), is futile in the wake of the Sixth Circuit's later decision in *Warren* v. *City of Athens*, 411 F.3d 697 (6th Cir. 2005), which, like *Brody*, was a land-use case that eschewed "shocks the conscience."

they underscore the deep confusion, both within and among the appellate courts, about the correct standard to apply. *See Scarborough* v. *United States*, 431 U.S. 563, 567 & n.4 (1977) (granting certiorari because of a "split among the Circuits," some of which also had intra-circuit conflicts).[4]

3. With respect to the Seventh and Ninth Circuits, the Township is hard-pressed to deny that those courts have decided the question presented in a way that squarely conflicts with the Third Circuit's approach. *See* Pet. 14-17. Rather than confront what those courts actually held, the Township instead quibbles over factual distinctions in those cases that have nothing to do with the pure legal question they resolved in direct conflict with the Third Circuit's decision below. These conflicts alone justify certiorari.

The rule that the Seventh Circuit articulated in *Khan* v. *Gallitano*, 180 F.3d 829 (7th Cir. 1999), is clear: the "shocks the conscience" test is "*not generally applicable to all substantive-due-process claims*," but instead applies "for particular circumstances such as the high-speed chase in *Lewis* or pre-trial detention." *Id.* at 836 (emphasis added). This holding is in direct conflict with the Third Circuit's position. The Township's response is to assert that this holding is just "dicta." Opp. 15. Not at all. The court in *Khan* engaged in alternative analyses, one applying "shocks the conscience" and one applying another standard, and held that the claim before it failed under both. 180 F.3d at 836.

The Township also suggests (Opp. 15) that the Seventh Circuit's subsequent opinion in *Galdikas* v. *Fagan*, 342 F.3d

---

[4] A final note as to these circuits: The Township cites *Conroe Creosoting Co.* v. *Montgomery County*, 249 F.3d 337 (5th Cir. 2001), and calls it "a land-use dispute" in which the Fifth Circuit applied "shocks the conscience." Opp. 13. That is wrong. *Conroe* is not about land use; it is about an invalid tax assessment and a property auction to pay off the delinquency.

684 (7th Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004), somehow limited *Khan*, but the opposite is true: the *Galdikas* court reaffirmed that *Khan* was still viable four years after its publication. Underscoring the confusion that *Lewis* has spawned, the Seventh Circuit in *Galdikas* emphasized that "the majority opinion in *Lewis* leaves a number of questions unresolved," including the scope of the "shocks the conscience" test. *Id.* at 690 n.3. It noted that the Seventh Circuit had previously identified this ambiguity in several cases, including *Khan* and *Armstrong* v. *Squadrito*, 152 F.3d 564 (7th Cir. 1998). *Id.* While the *Galdikas* panel noted that *Khan* and *Armstrong* took different approaches to substantive due process, it did not purport to side with *Armstrong* or otherwise to limit or overrule *Khan*. It instead skirted the question, noting that "[r]esolution of this ambiguity is not necessary to our decision." *Id.* Thus *Galdikas* both leaves *Khan* intact and dramatizes the chaos that exists in the lower federal courts. Not only are the courts sharply divided over when and how *Lewis* applies, but panels within the same circuit often struggle with this important question. This Court should grant the petition to clarify and unify the law.

The Township's effort to explain away the Ninth Circuit's decision in *Kennedy* v. *City of Ridgefield* is equally ineffective. The *Kennedy* court wrote that the circuit had "explicitly" considered whether to adopt a "shocks the conscience" standard in the context of a state-created-danger substantive-due-process claim and had refused. 439 F.3d at 1064 (citing *L.W.* v. *Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)). Hewing to that precedent, the court of appeals applied a "deliberate indifference" test, and emphasized that it would not consider whether the defendant's behavior shocked the conscience. *Id.* at 1065. This holding, again, is in direct conflict with the Third Circuit. The Township attempts to distinguish *Kennedy* by pointing out that another (separate) issue in the case had to do with the "extension of the 'state-created danger' doctrine." Opp. 16. That, though, is irrelevant: Many

decisions contain multiple holdings, but that does not impugn the precedential impact of any one of them.[5] The Township also argues that the Ninth Circuit "heed[s] [the rule] * * * that substantive due process claims should be analyzed under specific Amendments." Opp. 17. Again irrelevant. It is settled law that substantive-due-process claims are not cognizable when a specific constitutional amendment applies. *See Albright* v. *Oliver*, 510 U.S. 266, 274 (1994). That fact has nothing to do with how the court should proceed when no amendment applies. There is, in short, no colorable way to distinguish *Kennedy*.

4. We do, however, agree with the Township about one point: the First Circuit just recently changed course and joined the Third, Tenth, Eleventh, and D.C. Circuits in adopting an across-the-board "shocks the conscience" test. *See Mongeau* v. *City of Marlborough*, — F.3d —, 2007 WL 1793137 (1st Cir. June 22, 2007). Of course, this decision only sharpens the division within the courts of appeals; now instead of a seven-to-four split in the circuits, there is a narrower six-to-five split. Moreover, the First Circuit's recent decision exemplifies the recurring nature of the question presented and the evolving and disjointed approaches the federal courts of appeals continue to take in answering that question. This Court should grant the petition to resolve these deep divisions.

---

[5] The Township resorts to the same legerdemain when addressing the eight-judge dissent from denial of rehearing *en banc* in *Kennedy*. *See Kennedy* v. *City of Ridgefield*, 440 F.3d 1091, 1092 (9th Cir. 2006) (en banc) (Tallman, J., dissenting). The Township contends that "the quarrel raised by the dissent" focused on the state-created danger doctrine. Opp. 16. True, but the dissent quarreled with other aspects of the panel decision as well. And in addressing the substantive-due-process standard, the dissent focused its criticism on the ground that "liability cannot attach here where no 'conscience shocking' abuse of power can be alleged." *Kennedy*, 440 F.3d at 1094 (en banc dissent).

II. THE TOWNSHIP'S ARGUMENTS ABOUT SUPREME COURT PRECEDENT AND PROCEDURE ARE MISTAKEN.

1. The Township contends that this Court has applied the "shocks the conscience" test post-*Lewis* in contexts other than law enforcement and prisons. Opp. 7. Its citations, however, make clear that this Court has not employed the test so broadly. The Township's first case, *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), was a land-use decision that cited *Lewis* once in passing. But the phrase "shocks the conscience" appears *nowhere* in the decision. Instead, this Court measured the substantive-due-process claim in *Cuyahoga Falls* by looking for "arbitrary" or "egregious" conduct. *See id.* at 198-199. If anything, by carefully avoiding the "shocks the conscience" formulation, *Cuyahoga Falls* confirms that this Court has never endorsed a one-size-fits-all approach to substantive due process.

The Township fares no better with *Chavez* v. *Martinez*, 538 U.S. 760 (2003). As we explained in the petition (Pet. 25), this Court in *Chavez* used the "shocks the conscience" standard to assess the constitutionality of a coercive police interrogation of an arrested and hospitalized suspect. *See id.* at 764. But there is no dispute that "shocks the conscience" applies to the action of police officers and other executive officials where there is little or no time to deliberate. The question presented by this petition—and the one on which the lower courts are divided—is whether that standard applies categorically to *all* types of executive action.

2. The Township also repeats two procedural arguments—one involving timeliness and the other waiver—that it already presented to the Court.[6] Both arguments misapprehend this Court's precedents.

---

[6] *See* Opp. to Mot. for Enlargement of Time (May 16, 2007).

a. The Township argues that the Petition is too late because it seeks review of an issue decided in *Eichenlaub I*. But we explained in the petition (Pet. 12 n.2) that this Court may—and often does—grant certiorari from a second appellate decision and "may consider questions raised on the first appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (emphasis added); *see also Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001); Robert L. Stern *et al.*, *Supreme Court Practice* 359 (8th ed. 2002).

The Township insists that this rule applies only "where this Court could not review the first decision." Opp. 4. Not so. In *Garvey*, the respondent likewise argued that because the "petition was filed more than 90 days after the [Ninth Circuit's decision in] *Garvey I*"—and because the petitioner could have sought certiorari then—this Court could not "consider a challenge raising issues resolved in that decision." 532 U.S. at 508 n.1. But this Court roundly rejected the argument: "[T]here is no question that the Association's petition was filed in sufficient time for us to review *Garvey II*, and we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Id.* Because the Eichenlaubs timely petitioned for certiorari following *Eichenlaub II*, this Court can and should consider the important question resolved during *Eichenlaub I*.

b. The Township's waiver argument is likewise mistaken. An issue is properly presented so long as it was "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). There is no question that the Eichenlaubs pressed for the "improper motive" standard below. After all, the magistrate judge and the District Court agreed that the Eichenlaubs had adequately alleged a substantive-due-process violation under that particular standard. *See* Pet. 7, 10. There is also no question that the issue was "passed upon" by the *Eichenlaub I* court, which acknowledged *United Artists* and reaffirmed the rule adopted there.

The Township nonetheless argues that the Eichenlaubs waived the issue because they "abandoned" it after *United Artists* and "embraced the 'shocks the conscience' standard without reservation." Opp. 5. The Eichenlaubs did no such thing. As the Township's own quotes from the briefs below reveal, the Eichenlaubs merely admitted what was indisputable: that the Third Circuit had adopted a new standard and that the *Eichenlaub I* panel was bound to apply it. Opp. 6. This Court has held that a party need do no more to preserve the issue. In *Williams*, for example, the petitioner had similarly conceded below "not that the responsibilities [that a recent panel decision] had imposed were proper, but merely that [the decision] had imposed them." 504 U.S. at 44. This Court refused to equate that with waiver. *Id.* And for good reason. To "impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent * * * seems to us unreasonable." *Id.* The important question presented by the petition was pressed below and should be decided by this Court.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GERRI L. SPERLING
METZ LEWIS L.L.C.
11 Stanwix Street
18th Floor
Pittsburgh, PA 15222
(412) 918-1165

CATHERINE E. STETSON
CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Petitioners